Supreme Court, U.S.
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No. 05-____
(CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,
Petitioner,

v.

ANDREW DARRYL BUSBY,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. Whether the federal constitutional right to an impartial jury requires automatic reversal of a conviction, irrespective of the lack of bias of the seated jury, when the defendant uses one of his peremptory challenges to remove a venireman who should have been struck upon the defense's motion to remove for cause and seeks but is denied an additional peremptory challenge to remove a specific juror?

II. Whether the equal protection prohibition against the exercise of discriminatory peremptory challenges is violated by Florida's per se reversible error rule in conjunction with a denial of an additional peremptory challenge to replace that used to remove a venireman improperly retained upon a motion to strike for cause?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I. THE FLORIDA SUPREME COURT'S DETERMINATION -- THAT THE TRIAL COURT'S FAILURE TO REMOVE A VENIREMAN SUBJECT TO A STRIKE FOR CAUSE AND DEFENDANT'S "LOSS" OF A PEREMPTORY CHALLENGE USED TO REMOVE THAT VENIREMAN VIOLATED HIS RIGHT TO AN IMPARTIAL JURY -- IS INCONSISTENT WITH THIS COURT'S DECISIONS IN ROSS v. OKLAHOMA, 487 U.S. 81 (1988) AND UNITED STATES v. MARTINEZ-SALAZAR, 528 U.S. 304 (2000), THE COURT'S HARMLESS ERROR JURISPRUDENCE, AND CONFLICTS WITH DECISIONS OF OTHER STATE SUPREME COURTS AND UNITED STATES COURTS OF APPEALS 6

A. Use of a peremptory challenge to correct a trial court's erroneous denial of a motion to strike a venireman for cause does not violate the Sixth Amendment of the United States Constitution 8

B. Per se reversible error resulting from not according a defendant an additional peremptory challenge where the trial court erroneously denied the defense motion for a strike for cause violates this Court's jurisprudence that constitutional errors may nonetheless be harmless 13

II. THE FLORIDA SUPREME COURT'S HOLDING THAT A DEFENDANT HAS AN UNQUALIFIED RIGHT TO PEREMPTORY CHALLENGES TO EFFECTUATE HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY VIOLATES BATSON v. KENTUCKY, 476 U.S. 79 (1986) AND ITS PROGENY BY PERMITTING THE DISCRIMINATORY USE OF PEREMPTORY CHALLENGES 15

Conclusion 18

Appendix ..... SEPARATE VOLUME

TABLE OF AUTHORITIES

Federal and State Constitutional Provisions

U.S. Const. amend. VI ..... *passim*

U.S. Const. amend. XIV
(Equal Protection Clause) 2, 15, 16, 17

Fla. Const. Art. I, § 16 ..... 6-7 n.3

Federal and State Statutes and Rules

28 U.S.C. § 1257(a) 2, 6 n.3

Federal Rule of Civil Procedure 61 ..... 13 n.7

Federal Rule of Criminal Procedure 52(a) 13 n.7

Fla. Stat. § 913.08 ..... 8 n.4, 13

Fla. Stat. § 924.33 ..... 13 n.7, 14 n.8

Federal Cases

Arizona v. Fulminante,
499 U.S. 279 (1991) 14

Batson v. Kentucky,
476 U.S. 79 (1986) 15, 16, 17

Clemons v. Mississippi,
494 U.S. 738 (1990) 14

Edmonson v. Leesville Concrete Co.,
500 U.S. 614 (1991) 16

Georgia v. McCollum,
505 U.S. 42 (1992) 16-17

Gilbert v. Moore,
134 F.3d 642 (4th Cir.) (en banc),
cert. denied, 525 U.S. 840 (1998) 10

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127 (1994) 16, 17

Jones v. Dretke,
375 F.2d 352 (5th Cir. 2004),
cert. denied, 125 S.Ct. 878 (2005) 10 n.5

Jones v. United States,
527 U.S. 373 (1999) 14

Maryland v. Garrison,
480 U.S. 79 (1987) 8 n.3

Michigan v. Long,
463 U.S. 1032 (1983) 8 n.3

Neder v. United States,
527 U.S. 1 (1999) 14

Ohio v. Reiner,
532 U.S. 17 (2001) 7 n.3

Pennsylvania v. Muniz,
496 U.S. 582 (1990) 8 n.3

Powers v. Ohio,
499 U.S. 400 (1991) 16

Robinson v. Jabe,
1992 U.S. App. LEXIS 2121 (6th Cir. 1992)
(unpublished) 10, 12

Rose v. Clark,
478 U.S. 570 (1986) 14

Ross v. Oklahoma,
487 U.S. 81 (1988) ..... *passim*

Satterwhite v. Texas,
486 U.S. 249 (1988) 14

Spies v. Illinois,
123 U.S. 131 (1887) 9

Stroud v. United States,
251 U.S. 380 (1920) (memorandum opinion) 9

United States v. Annigoni,
96 F.3d 1132 (9th Cir. 1996) (en banc) 15

United States v. Martinez-Salazar,
528 U.S. 304 (2000) 6, 7 n.3, 9, 10, 11

United States v. Prati,
861 F.2d 82 (5th Cir. 1988) 10 n.5

United States v. Serino,
163 F.3d 91 (1st Cir. 1998) 15

Vasquez v. Hillery,
474 U.S. 254 (1986) 15

Watley v. Williams,
218 F.3d 1156 (10th Cir. 2000),
cert. denied, 531 U.S. 1089 (2001) 10

Witherspoon v. Illinois,
391 U.S. 510 (1968) 10 n.5, 12 n.6

State Cases

Bangs v. State,
998 S.W.2d 738 (Ark. 1999) 10

Brown v. State,
538 So. 2d 833 (Fla. 1989) 7 n.3

Commonwealth v. Auguste,
605 N.E.2d 819 (Mass. 1992) 11

Commonwealth v. Impellizzeri,
661 A.2d 422 (Pa. 1995) 11

Commonwealth v. Wood,
451 N.E.2d 714 (1983) 11

David v. Commonwealth,
493 S.E.2d 379 (Va. 1997) 11

Dawson v. State,
581 A.2d 1078 (Del. 1990) 10

Dye v. State,
717 N.E.2d 5 (Ind. 1999),
cert. denied, 531 U.S. 957 (2000) 10

Ex parte Dailey,
828 So. 2d 340 (Ala. 2001) 9-10, 10 n.5

Foster v. State,
778 So. 2d 906 (Fla. 2000) 6 n.3

Fuson v. State,
735 P.2d 1138 (N.M. 1987) 11

Globe v. State ,
877 So. 2d 663 (Fla. 2004) 3

Grandison v. State,
670 A.2d 398 (Md. 1995) 10

Johnson v. State,
43 S.W.3d 1 (Tex. Crim. App. 2001) 12 n.6

Klahn v. State,
96 P.3d 472 (Wyo. 2004) 9, 11

Manning v. State,
378 So. 2d 274 (Fla. 1979) 7 n.3

Marshall v. State,
854 So. 2d 1235 (Fla. 2003) 6 n.3

Mettetal v. State,
602 So. 2d 864 (Miss. 1992) 10

Minch v. State,
934 P.2d 764 (Alaska Ct. App. 1997) 10, 12

People v. Cahill,
809 N.E.2d 561 (N.Y. 2003) 12 n.6

People v. Crittenden,
885 P.2d 887 (Cal. 1994),
cert. denied, 516 U.S. 849 (1995) 11

People v. Gleash,
568 N.E.2d 348 (Ill. Ct. App. 1991) 10

People v. Lefebre,
5 P.3d 295 (Colo. 2000) 11 n.6

People v. Yeoman,
72 P.3d 1166 (Cal. 2003),
cert. denied, 541 U.S. 991 (2004) 9, 11

Powell v. Allstate Ins. Co.,
652 So. 2d 354 (Fla. 1995) 6-7 n.3

Rolling v. State,
695 So. 2d 278 (Fla. 1997) 6 n.3

State v. Albano,
111 A. 753 (Me. 1920) 12 n.6

State v. Alen,
616 So. 2d 452 (Fla. 1993) 7 n.3

State v. Barone,
969 P.2d 1013 (Or. 1998) 10

State v. Conner,
440 S.E.2d 826 (N.C. 1994) 12 n.6

State v. Crawford,
872 P.2d 293 (Kan. 1994) 10

State v. Cross,
658 So. 2d 683 (La. 1995) 11-12 n.6

State v. DiFrisco,
645 A.2d 734 (N.J. 1994) 10

State v. Esposito,
613 A.2d 242 (Conn. 1992) 11 n.6

State v. Fire,
34 P.3d 1218 (Wash. 2001) 10

State v. Freshment,
43 P.3d 968 (Mont. 2002) 12 n.6

State v. Good,
43 P.3d 948 (Mont. 2002) 12 n.6

State v. Graham,
780 P.2d 1103 (Haw. 1989) 10, 11 n.6

State v. Hickman,
68 P.3d 418 (Ariz. 2003) 11

State v. Kauhi,
948 P.2d 1036 (Haw. 1997) 11 n.6

State v. Menzies,
889 P.2d 393 (Utah 1994),
cert. denied, 513 U.S. 1115 (1995) 10

State v. Middlebrooks,
840 S.W.2d 317 (Tenn. 1992) 10

State v. Neuendorf,
509 N.W.2d 743 (Iowa 1993) 10, 11

State v. Nicklasson,
967 S.W.2d 596 (Mo. 1998) 10

State v. Pelletier,
552 A.2d 805 (Conn. 1989) 10

State v. Phillips,
461 S.E.2d 75 (W. Va. 1995) 10, 12 n.6

State v. Ramos,
808 P.2d 1313 (Idaho 1991) 10

State v. Santelli,
159 Vt. 442, 621 A.2d 222 (Vt. 1992) 11

State v. Tyler,
553 N.E.2d 576 (Ohio),
cert. denied, 498 U.S. 951 (1990) 10, 12 n.6

State v. Verhoef,
627 N.W.2d 437 (S.D. 2001) 10

State v. Wach,
24 P.3d 948 (Utah 2001) 10

Thomas v. Commonwealth,
864 S.W.2d 252 (Ky. 1993),
cert. denied, 510 U.S. 1177 (1994) 11 n.6

Trotter v. State,
576 So. 2d 691 (Fla. 1990) 8-9 n.4

No. 05-_____

IN THE
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STATE OF FLORIDA,
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v.

ANDREW DARRYL BUSBY,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Florida

Petitioner, State of Florida, prays the Court for its order granting a writ of certiorari to review the judgment of the court below reversing respondent Busby's judgment of conviction.

OPINION BELOW

The February 3, 2005 Revised Opinion of the Florida Supreme Court, upon which petitioner seeks this Court's review, is reported at 2004 Fla. LEXIS 1925 (Fla. 2004), and published in the Appendix (hereinafter "App.") at pp. A-1-44.

JURISDICTIONAL STATEMENT

The Revised Opinion of the Supreme Court of Florida was issued on February 3, 2005. App. A-1-44. The court below denied the State's timely petition for rehearing on that same date. App. A-

45. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides, in pertinent part, that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent, Andrew Darryl Busby, was charged by indictment in the Circuit Court of Columbia County, Florida, on August 17, 2000, with the first-degree murder of Elton Ard. (R. 1:1.)[1] Ard, a fellow inmate of the Florida Department of Corrections also housed at the Columbia Correctional Institution, id., was murdered on July 3, 2000. Id. The jury found Busby guilty as charged on March 15, 2002. (R. 17:3360). The case then proceeded to the penalty-phase, (R. 82:1547), where the jury subsequently recommended that Busby be sentenced to death. (R. 84:1864). The trial court sentenced respondent accordingly. (R: 86:1915). A co-defendant, Charles Globe, was also indicted for the murder and convicted in a separate trial. (R. 1:1). Globe received a death sentence upon a jury's recommendation as well, which the Florida Supreme Court affirmed on March 18, 2004. Globe v. State, 877 So. 2d 663 (Fla. 2004).

The facts relevant to the issues herein raised are as follows:

At trial, respondent raised a challenge for cause against venireman Kim Lapan, which the trial court rejected. (R. 72:390; R:73:601). Busby ultimately exercised his remaining peremptory challenge to remove Mr. Lapan. (R. 73:602; R:74:607), and later sought two additional peremptory challenges, stating that he would remove veniremen Winston and Liebel with the extra challenges. (R. 75:744-745, 827). The trial court rejected respondent's request. (R. 75:745).

Following his conviction and sentencing, respondent appealed to the Supreme Court of Florida. There, Busby raised thirteen grounds for relief; relevant to this petition is his first claim: "The court erred in refusing to grant Busby's cause challenges to

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[1] Reference is made to the trial court record, specifically the state trial court clerk's record on appeal, with the appropriate volume number and page citation, designated "R. V:P."

prospective juror Kim Lapan, a former guard of death row prisoners and one who had a bias against them, which forced him to use a peremptory challenge to keep him off his jury, a violation of his Fifth, Sixth, and Fourteenth Amendment rights." Initial Brief Of Appellant, at 19. Busby argued that as a result of the trial court's error "compelling" him to exercise one of his peremptory challenges, he was denied his federal constitutional right to an impartial jury. Id. at 27. Busby reiterated that argument in his reply brief:

> The issue presented here is quite simple: Did the court correctly deny Busby's cause challenge for prospective juror Lapan. If not, and if he preserved the issue, as required by Trotter v. State, 576 So. 2d 691 (Fla. 1990), reversal is automatic because *he did not have the impartial jury guaranteed by the Sixth Amendment.* Id. at 693; Gootee v. Clevinger, 778 So. 2d 1005 (Fla. 5th DCA 2000).

Reply Brief Of Appellant, at 2 (emphasis added).

Before the Florida Supreme Court, the State responded that venireman Lapan was qualified to serve on the jury and that the trial court properly denied the motion to strike for cause. App A-170 & n.4. The State further argued that Winston and Liebel, who respondent would have removed had he been granted additional peremptory challenges, were also qualified to serve and the jury was not biased.[2] App A-172-173. For purposes of this petition

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[2] Juror Liebel was subsequently removed after the jury was empaneled, for reasons other than bias. App. A-13. In any event, though her son worked at Columbia Correctional Institution, Ms. Liebel stated that she would only consider aggravating evidence that the court instructed upon and that she could vote for life if the aggravating circumstances were insufficient or if the mitigation outweighed the evidence in aggravation. (R. 72:393, 394). Ms. Liebel also stated that she could follow the court's instructions. In respect to Mr. Winston, he also stated that he could follow the court's instructions and

only, the State assumes without conceding that venireman Lapan, who respondent ultimately chose to exercise a peremptory challenge after denial of his request that he be struck for cause, should have been removed upon that motion. Nonetheless, respondent made no effort to present any evidence that the jury that sat was biased, and at no time moved to strike Mr. Winston (who did sit on the jury) for cause. (R. 72:397, 480).

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could vote for life if the aggravating circumstances were insufficient (R. 73:475) or if the mitigating circumstances outweighed the aggravators. (R. 73:475-476). This was despite the fact that his son worked at another state correctional facility. (R. 73:479).

REASONS FOR GRANTING THE WRIT

I.

THE FLORIDA SUPREME COURT'S DETERMINATION -- THAT THE TRIAL COURT'S FAILURE TO REMOVE A VENIREMAN SUBJECT TO A STRIKE FOR CAUSE AND DEFENDANT'S "LOSS" OF A PEREMPTORY CHALLENGE USED TO REMOVE THAT VENIREMAN VIOLATED HIS RIGHT TO AN IMPARTIAL JURY -- IS INCONSISTENT WITH THIS COURT'S DECISIONS IN ROSS v. OKLAHOMA, 487 U.S. 81 (1988) AND UNITED STATES v. MARTINEZ-SALAZAR, 528 U.S. 304 (2000), THE COURT'S HARMLESS ERROR JURISPRUDENCE, AND CONFLICTS WITH DECISIONS OF OTHER STATE SUPREME COURTS AND UNITED STATES COURTS OF APPEALS.

In reversing his judgment of conviction, the Florida Supreme Court held that respondent's constitutional right to an impartial jury was violated upon the trial court's failure to grant an additional peremptory challenge where a motion to strike a venireman for cause was erroneously denied, respondent used his allotment of peremptories, and identified another venireman that he would remove upon receipt of an additional peremptory challenge.[3]

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[3] This Court has jurisdiction under 28 U.S.C. § 1257(a). The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." Article I, §16(a) of the Florida Constitution similarly provides in pertinent part that "the accused . . . shall have the right . . . to have a speedy and public trial by impartial jury in the county where the crime was committed." In addressing the right to an impartial jury, the Florida Supreme Court has included citation to both constitutional provisions -- without differentiation between the two. See, e.g., Marshall v. State, 854 So. 2d 1235, 1241 n.7 (Fla. 2003); Foster v. State, 778 So. 2d 906, 912 (Fla. 2000); Rolling v. State, 695 So. 2d 278, 284 (Fla. 1997); Powell v. Allstate

Ins. Co., 652 So. 2d 354, 358 (Fla. 1995); State v. Alen, 616 So. 2d 452, 453 (Fla. 1993); Brown v. State, 538 So. 2d 833, 834-835 (Fla. 1989); Manning v. State, 378 So. 2d 274, 277 (Fla. 1979). And in State v. Neil, 457 So. 2d 481 (Fla. 1984), the Florida Supreme Court described the constitutional right at issue and its furtherance in the same manner as subsequently described by this Court in Ross v. Oklahoma, 487 U.S. 81, 85, 88 (1988): "Article I, section 16 of the Florida Constitution guarantees the right to an impartial jury. The right to peremptory challenges is not of constitutional dimension. The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury." Neil, 457 So. 2d at 486.

The majority in Busby sometimes referred to the right as to "an impartial jury" and then at times cited to the Florida Constitution that provides that right. See, e.g., App. A-13, 14 n.8, 16, 17, 22, 23, 23, 24, 27. Busby raised the issue as a violation of his "Fifth, Sixth, and Fourteenth Amendment rights." App. A-47, 73; see also App. A-223, 231, 233. In ruling on the impartial jury claim, the Florida Supreme Court addressed decisions of this Court. App. A-20, 21, 23, 24, 25. And significantly, the majority opinion cited Justice Souter's concurrence in United States v. Martinez-Salazar, 528 U.S. 304 (2000), for the proposition that neither that opinion nor Ross compelled a different result. Specifically, the Florida Supreme Court distinguished those decisions upon its conclusion that this Court has not previously decided the constitutional issue as presented in Busby, where a defendant did all that state law required to preserve the impartial jury claim and was denied a request for an additional peremptory challenge to remove an identified venireman. See App. A-21 n.13 (quoting Martinez-Salazar, 528 U.S. at 317-18 (Souter, J., concurring)).

Accordingly, because (1) the right to an impartial jury under the state constitution is interpreted *in pari materia* with the United States Constitution, (2) respondent raised the claim under federal law, and (3) the Florida Supreme Court considered the issue in light of decisions from this Court, its isolated references to the state constitution does not constitute "an independent and adequate state ground for the decision" and thus does not insulate the Florida court's decision from this Court's review. Ohio v. Reiner, 532 U.S. 17, 20 (2001) ("In discussing the contours of that privilege [against self-incrimination under the Fifth Amendment], the court relied on our precedents. We have observed that this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law. . . . The decision at issue fairly appears . . . to be interwoven with federal law, and no adequate and independent state ground is clear from the face of

Both the majority and dissent readily identify the split of authority on the issue. App. A-25-26, 35, respectively. Pursuant to United States Supreme Court Rule 10(b), the grant of certiorari is warranted to clarify whether a violation of state law, relied upon to establish a federal constitutional error and interpreted to require automatic reversal, actually does establish a Sixth Amendment violation.

A. Use of a peremptory challenge to correct a trial court's erroneous denial of a motion to strike a venireman for cause does not violate the Sixth Amendment of the United States Constitution.

Assuming that the trial court should have struck Mr. Lapan for cause upon Busby's motion, respondent's use of a peremptory challenge to correct that error, and as required under state law to preserve that error, his request for an additional peremptory upon extinguishing those provided pursuant to statute, identification of another venireman upon whom he would have exercised it if so granted, and the denial thereof, does not give rise to a Sixth Amendment violation of respondent's right to an impartial jury.[4]

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the opinion.") (internal quotation marks and citations omitted); Michigan v. Long, 463 U.S. 1032, 1043 (1983) (rejecting contention that state decision rested upon an independent state ground notwithstanding two citations to state constitution, where court relied exclusively upon federal cases in construing Fourth Amendment); see also Pennsylvania v. Muniz, 496 U.S. 582, 588 n.4 (1990); Maryland v. Garrison, 480 U.S. 79, 83-84 (1987).

[4] Interestingly, prior to the Florida Supreme Court's decision in Busby, that court addressed the constitutional right to an impartial jury as a distinct claim and basis for relief from the statutory right to peremptory challenges accorded under state law, specifically Fla. Stat. § 913.08. In Trotter v. State, 576 So. 2d 691 (Fla. 1990), the state high court, first applying federal law -- the issue presented here -- held pursuant to Ross that the defendant made no showing that a biased juror was seated. Trotter, 576 So. 2d at 692-693. On the other hand, in respect to the state statutory right to a designated number of peremptory challenges provided to both the state and defendant dependent

In Ross v. Oklahoma, 487 U.S. 81 (1988), this Court held in part that the right of a defendant to an impartial jury under the Sixth Amendment is not violated when he chooses to exercise a peremptory challenge to remove a venireman that the trial court should have struck for cause. Id. at 88; see also Stroud v. United States, 251 U.S. 380, 381 (1920) (memorandum opinion); Spies v. Illinois, 123 U.S. 131, 168 (1887). The basis for this Court's decision is that peremptory challenges are a creature of statutory law and are not constitutionally required, instead serving as "a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." Ross, 487 U.S. at 88. Accordingly, in considering whether a defendant's right to an impartial jury was violated, the focus is upon the jurors who actually sat at trial. Id. at 86.

Two years later, in United States v. Martinez-Salazar, 528 U.S. 304 (1990), the Court reaffirmed its Sixth Amendment analysis, in the context of a federal trial, rejecting the claim that a "'loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury.'" Id. at 313 (quoting Ross, 487 U.S. at 88).

Addressing the constitutional guarantee of an impartial jury, in accord with Ross and Martinez-Salazar, the majority of jurisdictions presented with the Sixth Amendment claim have rejected the proposition that the right includes entitlement to a jury of a particular composition. See, e.g., Klahn v. State, 96 P.3d 472, 483 (Wyo. 2004); People v. Yeoman, 72 P.3d 1166 (Cal. 2003), cert. denied, 541 U.S. 991 (2004); Ex parte Dailey, 828 So. 2d 340,

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upon the potential punishment under the crime charged, the Florida Supreme Court set forth the requisite standard for establishing a violation of the statute. Trotter, 576 So. 2d at 693. Compliance with the statutory right to peremptory challenges as a ground for relief in itself was not before the Florida Supreme Court. See supra, at 3-4.

343 (Ala. 2001); State v. Verhoef, 627 N.W.2d 437, 441 (S.D. 2001); State v. Fire, 34 P.3d 1218, 1222, 1224 (Wash. 2001); Bangs v. State, 998 S.W.2d 738, 744-45 (Ark. 1999); Dye v. State, 717 N.E.2d 5, 18 n.13 (Ind. 1999); State v. Nicklasson, 967 S.W.2d 596, 612 (Mo. 1998); State v. Barone, 969 P.2d 1013, 1018-1019 (Ore. 1998); Minch v. State, 934 P.2d 764, 769-770 (Alaska Ct. App. 1997); Grandison v. State, 670 A.2d 398, 417-418 (Md. 1995); State v. Phillips, 461 S.E.2d 75, 92-93 (W. Va. 1995); State v. Crawford, 872 P.2d 293, 297-298 (Kan. 1994); State v. DiFrisco, 645 A.2d 734, 752 (N.J. 1994); State v. Menzies, 889 P.2d 393, 400 (Utah 1994) (and cited by State v. Wach, 24 P.3d 948, 956 (Utah 2001)), cert. denied, 513 U.S. 1115 (1995); State v. Neuendorf, 509 N.W.2d 743, 747 (Iowa 1993); Mettetal v. State, 602 So. 2d 864, 869 (Miss. 1992); State v. Middlebrooks, 840 S.W.2d 317, 329 (Tenn. 1992); State v. Ramos, 808 P.2d 1313, 1315 (Idaho 1991); People v. Gleash, 568 N.E.2d 348, 353-354 (Ill. Ct. App. 1991); Dawson v. State, 581 A.2d 1078, 1093-1094 (Del. 1990); State v. Tyler, 553 N.E.2d 576, 586 (Ohio), cert. denied, 498 U.S. 951 (1990); State v. Pelletier, 552 A.2d 805, 810 (Conn. 1989); State v. Graham, 780 P.2d 1103, 1108 n.3 (Haw. 1989).[5]

The federal circuit courts of appeal similarly have followed this Court's decisions in Ross and Martinez-Salazar. See, e.g., Watley v. Williams, 218 F.3d 1156, 1160 (10th Cir. 2000), cert. denied, 531 U.S. 1089 (2001); Gilbert v. Moore, 134 F.3d 642, 655 (4th Cir.) (en banc), cert. denied, 525 U.S. 840 (1998); Robinson v. Jabe, 1992 U.S. App. LEXIS 2121 *13-14 (6th Cir. 1992) (unpublished).

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[5] In addition, the erroneous exclusion of qualified veniremen upon the *government's* request to strike for cause has also been the subject of analysis under Ross. See, e.g., Jones v. Dretke, 375 F.3d 352, 355-357 (5th Cir. 2004) (citing United States v. Prati, 861 F.2d 82, 87 (5th Cir. 1988)), cert. denied, 125 S.Ct. 878 (2005); Ex parte Dailey, 828 So. 2d 340, 343 (Ala. 2001). These cases have involved challenges for cause that did not rely upon Witherspoon v. Illinois, 391 U.S. 510 (1968).

Also following this Court's lead are at least two state supreme courts expressly abandoning the automatic reversal rule adhered to in Busby. Citing Ross and subsequent decisions in accord, the Supreme Court of Iowa chose to follow what it described as "the pattern established in this very substantial number of jurisdictions." Neuendorf, 509 N.W.2d at 746-747. Within the last seven months, the Supreme Court of Wyoming relied upon case law discussing Martinez-Salazar in adopting the harmless error rule requiring a showing that the seated jury was not impartial. Klahn, 96 P.3d at 481-484 (quoting State v. Hickman, 68 P.3d 418 (Ariz. 2003)).

On the other hand, alike the majority's holding in Busby, there remain jurisdictions adhering to the rule that the so-called "loss" of a peremptory challenge upon an erroneous denial of a strike for cause constitutes a denial of the constitutional right to an impartial jury and requires automatic reversal. The majority relied upon these decisions, notwithstanding the fact that they applied or relied upon cases applying pre-Ross law. See People v. Crittenden, 885 P.2d 887, 906-907 (Cal. 1994) (compare Yeoman, cited supra, at 9), cert. denied, 516 U.S. 849 (1995); Commonwealth v. Auguste, 605 N.E.2d 819, 823-824 (Mass. 1992) (quoting Commonwealth v. Wood, 451 N.E.2d 714, 721 (1983)); Fuson v. State, 735 P.2d 1138, 1139-1140 (N.M. 1987); Commonwealth v. Impellizzeri, 661 A.2d 422, 426-427 (Pa. 1995); State v. Santelli, 159 Vt. 442, 445-446, 621 A.2d 222 (Vt. 1992); David v. Commonwealth, 493 S.E.2d 379, 381 (Va. 1997).[6]

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[6] The majority further relied upon numerous other cases, App. A-25-26, that do not address the Sixth Amendment right to an impartial jury as presented here. Instead, they turned upon procedural due process or state statutory and/or state constitutional provisions. See People v. Lefebre, 5 P.3d 295, 304 (Colo. 2000) (due process); State v. Esposito, 613 A.2d 242, 248, 249-250 (Conn. 1992) (state constitutional and statutory right to peremptory challenges); State v. Kauhi, 948 P.2d 1036, 1041 (Haw. 1997) (due process, citing Ross's due process analysis; compare Graham, cited supra, at 10); Thomas v. Commonwealth, 864 S.W.2d 252, 258-259 (Ky. 1993) (due process), cert. denied, 510 U.S. 1177 (1994); State v. Cross, 658 So. 2d 683,

Yet in facts paralleling those in Busby -- where a defendant's request for a strike for cause was erroneously denied, all peremptory challenges were used, he identified another venireman that he would remove but for the denial of a requested additional peremptory -- the Sixth Circuit reached the opposite result of the Florida Supreme Court. Robinson, 1992 U.S. App. LEXIS 2121 *13-14. And the Alaska Court of Appeals, which assumed that the defendant would have used an extra peremptory to remove a specific venireman that ended up on the jury, rejected a presumption of prejudice or that it was sufficient that the defendant did not have a jury composed of certain individuals to establish reversible error. Minch, 934 P.2d at 769-770.

As the foregoing demonstrates, there exists a vast split of authority between the states, including continued reliance upon pre-Ross decisions -- presenting a significant basis for guidance from this Court. Indeed, state law accords criminal defendants the right to exercise peremptory challenges, which of course is done in every jury trial. Thus, the potential for error in the trial court's exercise of discretion in evaluating a defendant's for cause strike and the resultant effect on his peremptory challenges rights is evident,

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686 (La. 1995)(state constitutional and statutory right to peremptory challenges); State v. Freshment, 43 P.3d 968, 975 (Mont. 2002) (state law right, citing State v. Good, 43 P.3d 948, 956 (Mont. 2002)); People v. Cahill, 809 N.E.2d 561, 577-578 (N.Y. 2003) (Witherspoon error; remedy citing state statute); State v. Conner, 440 S.E.2d 826, 835 (N.C. 1994) (state law basis, which precluded additional peremptory challenges, and peremptories not exhausted); Tyler, 553 N.E.2d at 586-587 (reviewing for error under state law and, assuming error, no prejudice found where peremptory challenge removed venireman); Johnson v. State, 43 S.W.3d 1, 2, 6 (Tex. Crim. App. 2001) (limited to interpretation and applicability of state harmless error appellate procedure rule); Phillips, 461 S.E.2d at 92-93 (distinguishing between distinct grounds raised: constitutional right to an impartial jury and statutory right to peremptory challenges). And one decision cited by the majority, also pre-Ross, did not identify the basis for the claim involving the use of the peremptory nor address the issue of prejudice. State v. Albano, 111 A. 753 (Me. 1920).

particularly given the expansive litigation of such matters. The petition for writ of certiorari should be granted.

B. Per se reversible error from the alleged error in not according a defendant an additional peremptory challenge where the trial court erroneously denied the defense motion for a strike for cause violates this Court's jurisprudence that constitutional errors may nonetheless be harmless.

Without having to demonstrate actual prejudice, the Florida Supreme Court held that a criminal defendant is entitled to a new trial if the trial court erred in not removing the venireman subject to a strike for cause where defendant then removed that person with a peremptory challenge, having used the remaining challenges afforded under Fla. Stat. § 913.08, and being denied an additional peremptory to remove an identified venireman that sits on the jury. This windfall to the defendant derives from an elevation of form over substance, and is not compelled by the federal constitution and is unfounded under state law.[7]

Under the Florida Supreme Court's opinion, the fairness of a defendant's criminal proceedings literally is irrelevant for the sake of a statutory right to a number of peremptory challenges intended in themselves to guarantee the fairness of those proceedings. Most states have rejected this very proposition. See App. A-35 n.23 (Bell, J., dissenting) (citing cases); see also supra,

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[7] As the dissent discussed in Busby, Fla. Stat. § 924.33 expressly "require[s] that a defendant show actual harm in order for a conviction to be reversed." App. A-37-38. That statute, pertaining to appellate review, mirrors the federal harmless error rules. Compare § 924.33 (no judgment shall be reversed unless the substantial rights of the appellant are affected) with Fed.R. Civ.P. 61 ("The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."); Fed.R. Crim.P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

at 9-11. In addition to "constitutionalizing" the statutory right to peremptory challenges, the state court's majority opinion simply cannot be reconciled with this Court's harmless error jurisprudence.

In the context of constitutional errors, the Court has recognized that "most" -- those not infringing upon the fairness of the trial -- "can be harmless." Neder v. United States, 527 U.S. 1, 8 (1999) (internal citation and quotation marks omitted). A number of examples abound where such errors were not subject to automatic reversal. See, e.g., Id. at 10, 15 (jury instruction omitting element of materiality in respect to federal tax fraud charges); Jones v. United States, 527 U.S. 373, 402 (1999) (assuming jury consideration of unconstitutional non-statutory aggravating circumstances); Arizona v. Fulminante, 499 U.S. 279, 309-310 (1991) (unconstitutional admission of coerced confession at guilt stage); Clemons v. Mississippi, 494 U.S. 738, 752-753 (1990) (unconstitutionally broad jury instructions at sentencing stage); Satterwhite v. Texas, 486 U.S. 249, 258 (1988) (unconstitutional admission of evidence at sentencing stage). Indeed, "'[i]f the defendant had counsel and was tried *by an impartial adjudicator*, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis.'" Neder, 527 U.S. at 8 (emphasis added; quoting Rose v. Clark, 478 U.S. 570, 579 (1986)).

Any error here in denying the strike for cause did not implicate the fairness of the trial and thus falls within the ambit of those cases cited above subject to harmless error analysis.[8] Given the absence of a showing that the jury here was biased, the Florida Supreme Court's decision simply elevates the status of a trial court error by creating a presumption of the deprivation of a substantial right -- based upon a misapprehension of the constitutional right to

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[8] The Supreme Court of Florida made no such analysis. And incidentally, even as a matter of state law the majority failed to apply the harmless error analysis required under § 924.33, Fla. Stat. See App. A-37-38 (Bell, J., dissenting in part).

an impartial jury. Compare Batson v. Kentucky, 476 U.S. 79, 100 (1986) (reversal required upon determination of purposeful discrimination in jury selection process); accord United States v. Serino, 163 F.3d 91, 93 (1st Cir. 1998) (rejecting harmless error argument); United States v. Annigoni, 96 F.3d 1132, 1143-1147 (9th Cir. 1996) (same); cf. Vasquez v. Hillery, 474 U.S. 254, 262-263 (1986) (harmless error analysis inapplicable to discrimination in grand jury selection process).

Because the Florida Supreme Court's decision cannot be reconciled with this Court's harmless error jurisprudence, the petition should be granted.

II.

THE FLORIDA SUPREME COURT'S HOLDING THAT A DEFENDANT HAS AN UNQUALIFIED RIGHT TO PEREMPTORY CHALLENGES TO EFFECTUATE HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY VIOLATES BATSON v. KENTUCKY, 476 U.S. 79 (1986) AND ITS PROGENY BY PERMITTING THE DISCRIMINATORY USE OF PEREMPTORY CHALLENGES.

In holding that Busby's constitutional right to an impartial jury was automatically denied -- based upon the state trial court's error in not removing a venireman for cause, respondent's use of a peremptory challenge to remove that individual, and the denial of respondent's request for an additional peremptory upon his identification of a venireman he would have removed but for the "compelled" use of that peremptory -- the Florida Supreme Court's interpretation of the Sixth Amendment violates Batson v. Kentucky, 476 U.S. 79 (1986) and its progeny. Thus, in addition to constitutionalizing the import of peremptory challenges, operation of the state court's application of state law allows a defendant to utilize a peremptory challenge on a discriminatory basis -- otherwise impermissible under the Fourteenth Amendment

-- to build in reversible error and obtain a new trial in the event of a conviction.

In Batson, this Court observed that it had previously held that "a denial of equal protection [occurs] where the procedures implementing a neutral statute operated to exclude persons from the venire on racial grounds, and has made clear that the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors." Id., 476 U.S. at 88 (internal footnotes omitted). See also Powers v. Ohio, 499 U.S. 400, 409 (1991) ("An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.").

The Court reiterated the above principles in J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994), stating that

> [s]ince Batson, we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory. We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.

Id. at 128. The Court thereupon held that the use of a peremptory challenge to remove a venireperson based upon gender violates the Equal Protection Clause, thus answering in the negative the question "whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury." Id. at 137 & n.6.

Further, because the right to the exercise of peremptory challenges is a matter of state statutory law, the use of peremptory challenges "is attributable to state action" on the trial level. Georgia v. McCollum, 505 U.S. 42, 54-55 & n.10 (1992); see also

Edmonson v. Leesville Concrete Co., 500 U.S. 614, 626 (1991) (civil litigant's use of peremptory challenges as authorized by a statutory provision constitutes state action). Thus just as the State is prohibited from exercising its peremptory challenges in a discriminatory fashion, so too is the criminal defendant. McCollum, 505 U.S. at 59.

Accordingly, it is beyond dispute that the per se reversible error rule accorded by the Florida Supreme Court similarly constitutes state action violative of the federal constitution, to the extent that it permits a requested peremptory challenge based upon a discriminatory purpose that would have been exercised but for lack of availability. The particular harm in the state court's decision rests with its automatic reversal rule that awards a defendant notwithstanding the undetectable potential unconstitutionality of his projected use of the requested peremptory. It is not the state-provided right to peremptory challenges itself that offends the Equal Protection Clause, see J.E.B., 511 U.S. at 143 (the conclusion that gender-based peremptory challenges are impermissible does not "imply the elimination of all peremptory challenges."). Instead, in this instance it is the Florida Supreme Court's interpretation of state law effectively authorizing such discriminatory challenges.

To clarify whether an automatic reversal rule in conjunction with the denial of additional peremptory challenges is constitutional or contrary to Batson and its progeny, the petition for writ of certiorari should be granted.

CONCLUSION

WHEREFORE, Petitioner State of Florida prays the Court for its order issuing a writ of certiorari and reversing the judgment of the court below.

Respectfully submitted,

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Case No. 05-____
(CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,
Petitioner,

v.

ANDREW DARRYL BUSBY,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Florida

APPENDIX TO PETITION

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INDEX TO APPENDIX

Revised Opinion,
Florida Supreme Court,
Dated November 4, 2004 ..... A-1 - A-44

Order Denying Motion for Rehearing,
Florida Supreme Court,
Dated February 3, 2005 ..... A-45

Initial Brief of Appellant,
in the Florida Supreme Court,
Filed April 10, 2003 ..... A-46 - A-131

Answer Brief of Appellee,
in the Florida Supreme Court,
Filed July 8, 2003 ..... A-132 - A-221

Reply Brief of Appellant,
in the Florida Supreme Court,
Filed August 21, 2003 ..... A-222 - A-248

Appellee's Motion for Rehearing,
in the Florida Supreme Court,
Filed November 29, 2004 ..... A-249 - A-263

Response To Appellee's
Motion For Rehearing,
in the Florida Supreme Court,
Filed November 29, 2004 ..... A-264 - A-268

SUPREME COURT OF FLORIDA

No. SC02-1364

ANDREW DARRYL BUSBY,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[November 4, 2004]
REVISED OPINION

PER CURIAM.

Andrew Darryl Busby appeals his conviction of first-degree murder and sentence of death. We have jurisdiction. See art. V, §3(b)(1), Fla.Const. Based on our determination that the trial court committed reversible error in the denial of a challenge for cause, we reverse the conviction and vacate the sentence.

FACTUAL AND PROCEDURAL BACKGROUND

Although the reversal today renders the evidence, procedures, findings, and facts a total nullity, the facts and proceedings upon which the jury error operated in this case are important for analysis of the error and its impact. Busby was convicted of the July 3, 2000, first-degree murder of Elton Ard. Ard was a fellow inmate of Busby's at the Columbia Correctional Institution (CCI). Ard was Busby's cellmate and was one of seven potential victims targeted by Busby and another inmate, Charles

Globe. Evidence ascertained during trial indicated that the pair targeted Ard because he was harassing Busby.

On the morning of July 3, 2000, Ard was found dead in the cell he shared with Busby. Busby and Globe were also locked in the cell. An autopsy revealed that Ard had died from strangulation. In trial testimony, the medical examiner stated that Ard had injuries consistent with blunt force blows to his head, which did not contribute to his death. A garrote found in the cell was consistent with the pattern of bruising found on Ard's neck. Evidence recovered from the murder scene included a handwritten sign, photographs of writings on the prison wall, the magic marker used to make the writings, photographs of bloody fingerprints, a cigarette lighter found in Ard's hand, and a cigarette found in Ard's mouth.

After a series of interviews beginning around noon on July 3, 2000, both Busby and Globe confessed to killing Ard. At trial, the prosecution relied on Busby's July 3 statement as well as subsequent statements in which Busby revealed the sequence of events that transpired the night Ard was murdered. Busby did not testify in his own defense, but submitted a videotaped statement given by Globe in which Globe asserted responsibility for Ard's death.[1] The defense also offered the testimony of a jailhouse friend of Busby's who stated that Busby was small in stature and had been subjected to harassment while in prison.

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1. The State also proffered testimony from State Attorney's Office Investigator Lisa Long, who stated that she saw Busby make hand gestures to Globe during the videotaping of Globe's testimony. Outside the presence of the jury, Busby testified that he had signed the word "liar" to Globe. On cross-examination, Busby stated that he had called Globe a liar when Globe said that he acted alone in murdering Ard. The State presented Long's testimony to the jury and read to the jury the transcript of Busby's testimony concerning the "liar" sign. Busby then presented surrebuttal testimony from Globe that he did not see Busby's hand gestures, and even if he had, it would not have affected his testimony.

On March 22, 2002, after the close of the evidence, instructions, and arguments by counsel, the jury found Busby guilty of first-degree murder. The penalty phase commenced during which both the prosecution and defense submitted evidence. At the close of the penalty phase, the jury voted eleven to one to recommend the death penalty. On May 16, 2002, the trial court followed the jury's recommendation and sentenced Busby to death.

The trial court found four statutory aggravating factors[2] and no statutory mitigating factors, and listed fifty-four nonstatutory mitigating factors that were presented by the defense.[3] The court

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2. These aggravating factors are: (1) crime committed while previously convicted of a felony and under sentence of imprisonment; (2) prior conviction of a felony involving the use or threat of violence; (3) heinous, atrocious, or cruel (HAC); and (4) cold, calculated, and premeditated (CCP).

3. The trial court identified the following possibly mitigating factors presented by the defense: (1) age at time of crime; (2) loved by family; (3) emotional handicaps; (4) witness to domestic violence; (5) deprived childhood; (6) poor upbringing; (7) cooperation with law enforcement; (8) first incarcerated at a young age; (9) sexual abuse by biological father; (10) physical abuse by biological father; (11) abandonment by family; (12) witnessed mother engage in prostitution by luring in truckers on CB; (13) placed in position as prey to sexual predators in prison; (14) abandoned by foster care parents; (15) attempted suicide at six years of age and admitted into hospital as a result of such; (16) witnessed sexual abuse of sisters by father; (17) witnessed sister on sister sexual abuse; (18) sexually abused by sister's boyfriend; (19) suffered sexual abuse from sister; (20) witnessed physical abuse by father upon mother; (21) witnessed physical abuse by father upon sisters; (22) witnessed physical abuse by mother upon sisters; (23) mother's continued denial of abuse and attempts to shift blame; (24) mothers' constant criticism and blame which destroyed self-esteem; (25) suffered institutional neglect while in care of the Department of Health and Rehabilitative Services; (26) suffered sexual harassment as a result of institutional neglect of Department of Corrections while in prison; (27) trauma of deprivation of love and nurturing (particularly in formative years); (28) artistic ability; (29) learning disabled; (30) chaotic and violent childhood; (31) sexually harassed in prison; (32) impaired mental capacity; (33) good work habits; (34) loyal, devoted, and kind to adopted father; (35) small in stature which led to inmate sexual abuse; (36) heartache and sadness in life; (37) voluntary confession in this case; (38) codefendant caused death of victim; (39) poor judgment and impulsive behavior; (40) low self-esteem; (41) feelings of being persecuted, exploited, resulting in

noted that some of the nonstatutory mitigating factors were repetitious and stated that each of the aggravating factors in this case, standing alone, would be sufficient to outweigh all the mitigation that was presented.

FOR-CAUSE CHALLENGE TO POTENTIAL JUROR LAPAN

Busby has asserted thirteen issues on appeal. We conclude that the trial court's error in denying Busby's challenge for cause against potential juror Kim Lapan requires reversal of Busby's conviction, and, therefore, decline to address the remaining twelve issues.[4] "Where an appellant claims he was wrongfully forced to exhaust his peremptory challenges because the trial court erroneously denied a cause challenge, both error and prejudice must be established." Conde v. State, 860 So.2d 930, 941 (Fla. 2003).

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mistrust; (42) prior suffering created stress that led to offense that was committed for emotional reasons; (43) no true childhood friends; (44) dominated by codefendant; (45) unable to formulate a clear victim/offender identity; (46) abuse was not reported early; (47) mother did not believe claim of abuse; (48) poor access to information as to what happened throughout defendant's development; (49) confessed in first homicide case; (50) remorse about murders in first homicide case; (51) cooperative with law enforcement in defendant's first homicide case; (52) cooperative in the investigation of the homicide of Elton Ard; (53) poor judgment and impulsive behavior, and (54) feelings of being persecuted and exploited, resulting in mistrust.

4. In addition to the issue addressed in the opinion, Busby argued that the trial court erred by: (1) excluding self-defense testimony; (2) admitting the testimony of State Attorney Investigator Lisa Long and by admitting a transcript of Busby's proffered testimony; (3) allowing codefendant Globe to testify by videotape; (4) denying the motion to suppress Busby's July 3 and 7 statements; (5) admitting evidence of prior bad acts under Williams v. State, 110 So.2d 654 (Fla. 1959); (6) admitting during the penalty phase a transcript of the July 7 confession; (7) finding the CCP aggravator; (8) excluding defense penalty phase exhibits; (9) admitting during the penalty phase a letter written by Busby to Globe; and that (10) the court erred during the penalty phase by admitting evidence of Busby's prior violent felony convictions; (11) the penalty phase instructions violate Caldwell v. Mississippi, 472 U.S. 320 (1985); and (12) Florida's death penalty statute is unconstitutional.

Based on the record before us, we conclude that Busby satisfies both prongs of that standard.

Trial Court's Erorr in Finding Lapan Competent to Serve

According to Busby, the trial court erred when it refused to grant Busby's challenge for cause against Kim Lapan, a former guard of death row inmates at Florida State Prison. He argues that Lapan's acknowledges biases against death row inmates and admitted willingness to execute persons who had committed premeditated murders presented reasonable doubts as to his impartiality. We agree.

Lapan was not only a former correctional officer at Florida State Prison, he had worked directly on death row. He stated during voir dire that some of the correctional officers involved in the prison death of Frank Valdez[5] were friends of his. During voir dire, the following exchange occurred between Lapan and defense counsel:[6]

> [By the defense]
> Q Mr. Lapan, would you say that you oppose or you are in favor [of the death penalty]--
> A I am in favor of it. I worked in Florida state prisons.
> Q Did you work on death row?
> A Yes.
> . . . . .

---

5. Valdez, a death row inmate at Florida State Prison, died after an altercation with prison guards.

6. This exchange followed questioning by the prosecution in which Lapan answered generally that the understood the bifurcated nature of death penalty proceedings and could follow the trial court's instructions with regard to assessing and weighing aggravating and mitigating circumstances in a sentencing recommendation.

Q Based upon your experiences as a correctional officer, if I told lyou that you would end up learning this homicide occurred inside a prison, do you think that would affect your ability to sit as a juror?
A Possibly.
Q Would that be something that knowing the position that you held before, you might consider something an aggravating circumstance beyond what the judge says, based on your own personal experiences?
A Possibility.
Q We talk about aggravating circumstances. You understand that's what the judge is going to read as far as the circumstances that are recognized by law to possibly warrant a death penalty?
A Yes.
Q And mitigating circumstances being those circumstances the law says you can consider as to whether a life imprisonment sentence might be appropriate. You understand that as well?
A Yes.
Q Knowing that you have worked on death row as well, you understand these days life means life?
A Right.
Q Knowing that, do you think that based on your experiences as a correctional officer that worked on death row, that there might be things in your mind that are aggravating circumstances that you would consider outside those that the judge read you, particularly once you learn that this homicide was --
A No. I don't think so. I think I can determine what the judge wants and go by what they feel are the parameters we are supposed to stay within.
Q So what you are saying, even though you worked as a correctional officer for eight years –

A Yes, sir.
Q - with part of that time spent on death row --
A Yes, sir.
Q - that you don't think that any of your own personal experiences would come into play as far as maybe you think something is an aggravating circumstance that could possibly warrant a death sentence that was not included in the judge's instructions?
A I would like to think I could be openminded enough.

. . . . .

Q Do you believe that life in prison is severe enough punishment for someone who is found guilty of premeditated murder?
A No.
Q If - understanding that you have to find Mr. Busby guilty of premeditated murder for us to make it to a second phase?
A Yes.
Q Would that fact be considered by you as an aggravating circumstance that might cause you to vote for death - the judge is not going to tell you that is an aggravating circumstance. But knowing that - to get to the second phase you would have to find Mr. Busby guilty of premeditated murder, do you think that would be something that would weigh in favor of the death sentence in your mind?
A No, I don't think so.
Q Are there any cases that you can think of particularly based upon you working on death row? Are there any cases that you think would automatically warrant the death penalty regardless of aggravating and mitigating circumstances?
A Yes.
Q What would that be?

A Child molesters. Some of the heinous crimes that are committed, the way they murder or kill, what they have done to the victims. Their past history on - you know, can they, you know, what will happen when they have done their time - there isn't time. That's right.

. . . . .

Q Are there any other circumstances that you can think of --

A I can't think of any offhand.

. . . . .

Q Now you had mentioned someone having been convicted prior of crimes. Might in your mind be something that would cause you to automatically vote for the death sentence?

A Possibly.

Q I think you are anticipating my next question. Is that a situation where no matter what mitigation circumstances are given, vote for death regardless of the mitigating circumstances?

A Unless there is extremely - proof is proof. I am not understanding some of the questions. They are so hypothetical. That, you know --

Q I am going to clarify this one question involving a situation where someone had previously been convicted of a crime. What I am asking is, is that one of those situations where no matter how much proof of mitigation --

A No.

Q - you would say, no, that crime is a death penalty every time in my mind?

A No.

Q While you were at F.S.P., were you ever the victim of any assaults?

A Yes.

Q Do you think that is something in your own mind if you learn that this had taken place in a

correctional institution would factor in regardless of what the judge said as far as affecting your mind?
THE COURT: You can answer that if that the [sic] going to affect your decision in this case.
THE PROSPECTIVE JUROR: I don't know.
BY MR. DOSS [The Defense]:
Q If the judge instructs you to set your personal feelings aside, would that be something you can or can't set aside?
A I believe I can.

The defense moved to strike Lapan for cause after individual voir dire based on his experience as a correctional officer on Florida's death row. Defense counsel expressed doubt that Lapan could set aside those experiences, despite his assertions that he could. The trial court denied the motion. After group voir dire, the defense again moved to strike Lapan for cause, this time citing Lapan's friendship with officers in the Valdez case, and the different "biases and prejudices" he had. The motion was again denied.

"It is within a trial court's province to determine whether a challenge for cause is proper, and the trial court's determination of juror competency will not be overturned absent manifest error." Fernandez v. State, 730 So.2d 277, 281 (Fla. 1999). The decision to deny a challenge for cause will be upheld on appeal if there is support in the record for the decision. See Gore v. State, 706 So.2d 1328, 1332 (Fla. 1997); see also Mendoza v. State, 700 So.2d 670, 675 (Fla. 1997) ("A trial court has latitude in ruling upon a challenge for cause because the court has a better vantage point from which to evaluate prospective jurors' answers than does this Court in our review of the cold record."); Smith v. State, 699 So.2d 629, 635-36 (Fla. 1997) ("In reviewing a claim of error such as this, we have recognized that the trial court has a unique vantage pont in the determination of juror bias. The trial court is able to see the

jurors' voir dire responses and make observations which simply cannot be discerned from an appellate record.").

The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. See Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984). A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. See Bryant v. State, 656 So.2d 426, 428 (Fla. 1995); see also Hill v. State, 477 So.2d 553, 556 (Fla. 1985) (providing that if "any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause").

In this case, all three prospective jurors who were working as correctional officers at the time of the voir dire were dismissed for cause. Neither of the two potential jurors with prior experience as correctional officers were dismissed for cause. This Court has consistently held that the mere fact that someone is a correctional officer is not per se grounds for a cause challenge. See State v. Williams, 465 So.2d 1229, 1230 (Fla. 1985) (holding that the court did not err when it denied challenge for cause against two correctional officers in a prosecution for battery against a correctional officer in a correctional institution); Lusk, 446 So.2d at 1041; Morgan v. State, 415 So.2d 6, 10 (Fla. 1982). Therefore, the fact that Lapan was a former correctional officer was not, in and of itself, grounds for a cause challenge.

The question for this Court is whether the trial court should have granted a cause challenge based on Lapan's responses when he was asked if he could be impartial in serving on Busby's jury. Lapan gave very equivocal responses to several critical questions regarding his ability to serve as an impartial juror in this type of case. The mere fact that a juror gives equivocal responses does not disqualify that juror for service. The question is whether the responses voiced by Lapan were equivocal enough to generate a

reasonable doubt about his fitness as a juror. "In evaluating a juror's qualifications, the trial judge should evaluate all of the questions and answers posed to or received from the juror." Parker v. State, 641 So.2d 369, 373 (Fla. 1994). The trial court must excuse a prospective juror for cause if "any reasonable doubt" exists regarding his ability to render an impartial judgment and recommendation as to punishment. See Bryant, 656 So.2d at 428; Hill, 477 So.2d at 556.

Lapan's equivocation on multiple sensitive and material questions regarding his ability to be impartial raise reasonable doubt about his fitness to serve as a juror in this type of case, and should have resulted in his being excused from the panel for cause. Importantly, Lapan responded that the fact that the accused had been convicted of prior crimes (as Busby had) might cause him to automatically vote for the death penalty. When asked whether he believed life imprisonment was severe enough punishment for a person convicted of premeditated murder, he answered, "No." Lapan also stated that because the homicide occurred inside a prison, his ability to serve as an impartial juror might be compromised. In a further response, Lapan indicated that he might construe such a fact as an aggravating circumstance, even beyond those aggravating circumstances as might be instructed by the trial judge. When specifically asked whether learning that the crime had taken place in a correctional institution would factor in his consideration of the case regardless of what the judge said, he voiced a highly suspect response of "I don't know." When asked whether he could comply with the trial court's instructions to set his personal feelings aside, Lapan could only muster a very weak "I believe I can." The nature of the case and the sentencing possibilities elevate our concern.

We recognize that although we are assessing Lapan's voir dire responses from a cold record,[7] the sequence of the questions and plainness of Lapan's responses leaves little doubt that, as a former death row prison guard, he was understandably unable to set aside his beliefs and experiences to serve as an impartial juror in a case involving a prison murder. Lapan equivocated on the very issue most crucial to his ability to deliberate in an unbiased manner to reach the appropriate verdict and sentencing recommendation. In our view, the record can support no other conclusion than that Lapan should have been excused for cause.

Prejudicial Impact

Having determined that the trial court erred in denying Busby's challenge to prospective juror Lapan for cause, our focus now turns to whether the error requires a new trial. In the State of Florida, expenditure of a peremptory challenge to cure the trial court's improper denial of a cause challenge constitutes reversible error if a defendant exhausts all remaining peremptory challenges and can show that an objectionable juror has served on the jury. See Trotter v. State, 576 So.2d 691 (Fla. 1991). As explained in Trotter, "This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted." Id. at 693. A defendant cannot demonstrate prejudice if the trial court grants the same number of additional peremptories as cause challenges that were erroneously denied. See Conde, 860 So.2d at 942. There is no question that Busby has satisfied the Trotter standard in this case.

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7. It is important that adequate records established and preserved, particularly with regard to matters as sensitive as this process. In this case, the record gives little insight as to the trial judge's assessment of Lapan's candor or the relative certainty of his answers that would be directed to consideration of the challenge for cause. Without explanation of the trial court's ruling, we rely on Lapan's responses as they appear to us from a cold record.

After the court denied the challenge for cause as to Lapan, defense counsel requested and was denied additional peremptory challenges. Counsel then identified jurors Liebel and Winston as objectionable jurors for whom he would have used the extra peremptory challenges had they been granted. Both Liebel and Winston had sons who also worked as correctional officers. Although neither was challenged for cause, Liebel was dismissed after being impaneled for sleeping during the trial and was replaced by an alternate juror. Winston, however, served on the final jury and participated in the verdict convicting Busby. Having exhausted his peremptory challenges, and having identified Winston as an objectionable juror who he would have otherwise removed from the prospective panel with a peremptory challenge, Busby satisfied the Trotter standard for prejudice and qualifies for a new trial.

The ably written dissent posits that it is time to abandon the Trotter standard, and institute a rule whereby the defendant must show "actual harm" for a conviction to be reversed. According to the dissent, actual harm would occur where the juror identified as "legally objectionable," or one who is biased or partial. In other words, one would be required to demonstrate that such juror should also have been excused for cause. We decline to modify the Trotter standard based on our determination that the Trotter test is necessary to properly protect the right to trial by an impartial jury accorded every defendant in this state, and to effectuate the statutory scheme granting peremptory challenges. The dissent would dismantle the peremptory challenge framework.

"The peremptory challenge has very old credentials." Swain v. Alabama, 380 U.S. 202, 212 (1965), overruled by Batson v. Kentucky, 476 U.S. 79 (1986).[8] The right to peremptory

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8. The Swain Court held that it was permissible to insulate from inquiry a prosecutor's removal of African-Americans from a particular jury on the assumption that the prosecutor's action had an acceptable basis. See Swain, 380 U.S. at 221-22. The Court further determined that to establish an equal protection violation, a defendant must show that the prosecutor had systematically, in case after case, removed African-Americans from all jury

challenges became the settled law of England in the middle ages, and was accepted by most American colonial courts. In 1790, Congress codified the English practice, by granting peremptory challenges to defendants in capital cases. See Swain, 380 U.S. at 214. Over the years, the federal rules were expanded to provide peremptory challenges in noncapital criminal cases and civil cases. See id at 214 n.14.

The law of peremptory challenges at the state level followed a similar evolutionary path. Today, every state provides peremptory challenges to both parties in criminal and civil cases. See id. at 216-17. In Florida, one's entitlement to peremptory challenges is long-standing. In fact, the entitlement to peremptory challenges preceded Florida's statehood. See Act of November 23, 1828, §48, 1839 Compilation of the Public Acts of the Legislative Council of the Territory of Florida 89, 99 ("[A]t the trial of all causes brought to the superior or county courts, either party shall have the right to challenge peremptorily four jurors, and as many more as he can show good cause for.")

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panels, "whatever the crime and whoever the defendant or the victim may be." Id. at 223. In Batson, the United States Supreme Court reversed itself and held that race-based peremptory challenges violate the equal protection rights of both the defendant and the struck juror. The Court also established a three-step inquiry to demonstrate the nondiscriminatory use of the challenge. See Batson, 476 U.S. at 97-98.

Our invocation of the Swain Court's explanation of the history and role of peremptory challenges should not be viewed as an endorsement of the discriminatory challenge scheme inoculated by that opinion. To the contrary, we note that the Florida Supreme Court's efforts in eliminating racial bias in the use of peremptory challenges preceded those at the federal level. See State v. Neil, 457 So.2d 481 (Fla. 1984), clarified, State v. Castillo, 486 So.2d 565 (Fla. 1986). This Court has expanded the Batson/Neil doctrine to include other protected classes of venirepersons to ensure that peremptory challenges do not serve as a vehicle for discrimination in Florida courts. See State v. Allen, 616 So.2d 452 (Fla 1993) (recognizing Hispanics as a cognizable ethnic group).

We rely on the High Court's reasoning in Swain only to the extent necessary to support our opinion that - properly used - peremptory challenges are fundamental to each party's ability to realize the constitutional guarantee of trial by an impartial jury.

The use of peremptory challenges has persisted despite detractors' arguments that they delay trials, increase trial expense, and are used to eliminate otherwise qualified jurors. See Swain, 380 U.S. at 216. As recognized by the United States Supreme Court, "The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury." Id. at 219; see also United States v. Martinez-Salazar, 528 U.S. 304 (2000). Indeed, as this Court has recognized, the very purpose of peremptory challenges is "the effectuation of the constitutional guaranty of trial by an impartial jury." Meade v. State, 85 So.2d 613, 615 (Fla. 1956); see also Francis v. State, 413 So.2d 1175, 1178 (Fla. 1982), receded from on other grounds by Muhammad v. State, 782 So.2d 343 (Fla. 2001). Although peremptory challenges are not themselves constitutionally guaranteed at either the state or federal level, such challenges are nonetheless "one of the most important of the rights secured to the accused." Swain, 380 U.S. at 219 (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)).

Focusing only on criminal trials for purposes of the instant analysis, Florida law provides both cause and peremptory challenges to both sides involved in criminal proceedings. See §§913.03; 913.08, Fla.Stat. (2003). Section 913.03 of the Florida Statutes outlines the grounds that support cause challenges. These grounds include: the absence of qualifications required by law; the juror being of unsound mind or beset by physical defects rendering him unable to perform the duties of a juror; the juror having conscientious beliefs that would preclude finding the defendant guilty; and a host of other grounds pertaining to the jurors' prior involvement in legal proceedings adverse to, or involving, the accused. See §913.03(1)-(9), Fla.Stat. (2003). This section also allows for cause challenges on more general grounds bearing on the jurors impartiality. The pertinent subsection provides:

> The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on

> whose complaint the prosecution was instituted that will prevent the juror from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he or she declares and the court determines that he or she can render an impartial verdict according to the evidence . . . .

§913.03(10), Fla.Stat. (2003). Thus, juror impartiality is a firm basis for excusing a prospective juror for cause in the State of Florida.

Florida law also provides the prosecution and criminal defendants with the same number of peremptory challenges. Each side is permitted ten peremptory challenges if the offense is punishable by death or life in prison, six if the offense is punishable by more than twelve months in prison (but not punishable by life in prison or death), and three for all other offenses. See §913.08(1), Fla.Stat. (2003). The statute does not enumerate the grounds which would support the exercise of a peremptory challenge because, as has long been recognized by Florida courts, use of a peremptory challenge need not be supported by a reason, so long as the challenge is not used to discriminate against a protected class of venirepersons. See Francis, 413 So.2d at 1179 ("[The peremptory challenge] is an arbitrary and capricious right which must be exercised freely to accomplish its purpose."); Shannon v. State, 770 So.2d 714, 716 (Fla. 4th DCA 2000) (stating that a peremptory challenge "need not be supported by any reason, although a party many use such a challenge in a way that discriminates against a protected minority") (quoting Black's Law Dictionary, 223 (7th ed. 1999)).

Thus, Florida law provides for two separate types of challenges to potential jurors with distinctly different underpinnings. Cause challenges can be made on certain enumerated grounds, including a potential juror's impartiality.

Peremptory challenges, on the other hand, can be used to excuse a juror for any reason, so long as that reason does not serve as a pretext for discrimination. The United States Supreme Court succinctly characterized the distinctions between cause and peremptory challenges as follows:

> The essential nature of the peremptory challenge is that it is one exercised without reason stated, without inquiry and without being subject to the court's control. While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. It is often exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another," Lewis [v. United States, 146 U.S. 370, 376 (1892)], upon a juror's "habits and associations," Hayes v. Missouri, [120 U.S. 67, 70 (1887)] or upon the feeling that "the bare questioning [a juror's] indifference may sometimes provoke a resentment," Lewis, [146 U.S. at 376].

Swain, 380 U.S. at 220 (citations omitted). On this basis, cause and peremptory challenges comprise distinct, but complementary, methods to aid those facing criminal charges in achieving the constitutional right of trial by an impartial jury. Accord Thomas v. Commonwealth, 864 S.W.2d 252, 259 (Ky. 1993).

Despite the grant of the two clearly separate and distinct types of challenges under Florida law, the dissent recommends that this Court essentially convert peremptories into cause challenges under the circumstances here. Under the theory espoused by the dissent, a defendant could qualify for relief for the erroneous denial of a cause challenge, and concomitant forced expenditure of a peremptory, only if a "legally objectionable," or biased, juror sat on

the ultimate jury panel. Such a theory blurs any distinction between cause and peremptory challenges.

The value of peremptory challenges is that they are intended and can be used when defense counsel cannot surmount the standard for a cause challenge. Requiring the defendant to show actual bias - the standard applicable to cause challenges - for the forced expenditure of a peremptory challenge renders the separate statutory grant of peremptory challenges totally meaningless. Such a construction also renders superfluous that aspect of section 913.03 which sets forth juror impartiality as grounds for a cause challenge, as the same showing would be required to vindicate the statutory right to exercise a peremptory challenge after a trial court has erroneously caused the loss of a peremptory challenge. Finally, the interpretation endorsed by the dissent would amplify the ability of one party to use peremptory challenges at the expense of the other in contravention of the plain language of section 913.08, which grants each party to a criminal proceeding the same number of peremptory challenges. Cf. People v. LeFebre, 5 P.3d 295, 304 (Colo. 2000) (holding that state law requiring both sides to receive the same number of peremptories unless good cause is shown rendered the wrongful grant of a prosecutorial cause challenge a violation of the defendant's due process rights). Such interpretations directly undercut this Court's charge of interpreting statutes as a harmonious whole, giving effect to each of their constituent parts. See Acosta v. Richter, 671 So.2d 149, 153-54 (Fla. 1996).

While the deleterious consequences of the interpretation espoused by the dissent may not be readily apparent in a case involving one curative use of a peremptory strike, it comes into stark relief when one considers what might occur if the trial court were to wrongly, but not purposefully or intentionally, deny two or more cause challenges. In such instance, the defendant would be in the position of expending many, if not all, of the peremptories allotted to correct the trial court's errors, and consequently would be deprived of the entitlement to challenge those jurors whose voir

dire answers reveal a real potential for bias, but who would otherwise not be subject to a challenge for cause. See Johnson v. State, 43 S.W.3d 1, 6 (Tex. Crim. App. 2001) ("If one of an accused's peremptory challenges could be taken away from him, who not five be taken, and if five, why not ten, leaving none, and all jurors be acceptable save unfair and partial ones.") (quoting Wolfe v. State, 178 S.W.2d 274, 279-80 (Tex. Crim. App. 1944)). Under such scenario, a defendant would lose the ability to exercise peremptories as a separate and distinct class of challenges as provided under Florida law. Nothing in the jurisprudence of this Court, including our decisions requiring a defendant to expend curative peremptory challenges, supports such a result.

The Trotter standard currently in place properly preserves the distinctions between cause and peremptory challenges. Under the existing standard, a defendant can obtain relief for the erroneously forced expenditure of a peremptory by showing the same type of harm such challenges are intended to cure - the seating of a juror whom the defendant suspects, but cannot prove, is biased. The defendant is not forced into the impossible situation of protecting his or her entitlement to peremptory challenges by proving harm under the for-cause standard.

Contrary to the characterization cast by the dissent, the Trotter standard has not thrown wide the doors to multitudes of defendant seeking a new trial because or erroneously denied cause challenges. In twelve of the seventeen opinions in which this Court has addressed denial of cause challenges under Trotter, the Court has determined that the defendant did not preserve prejudicial error. In three of those cases, the defendant failed to exhaust all peremptory challenges;[9] in seven of the cases, the defendant failed to identify a seated juror whom he or she would have excused if

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9. Gore v. State, 846 So.2d 461, 471 (Fla. 2003); Benedith v. State, 717 So.2d 472, 475 (Fla. 1998); Mendoza v. State, 700 So.2d 670, 674-75 (Fla. 1997).

allowed;[10] and in three, the defendant received additional peremptories to replace each erroneously denied cause challenge.[11] In four of the five cases in which the issue was deemed preserved for review, this Court determined that the trial court did not err in denying the for-cause challenge.[12] Thus, in its fourteen-year history, application of the Trotter standard by this Court has not resulted in the reversal of a conviction prior to the Court's decision today. The Trotter standard has proven to be an effective means of protecting the right of defendants to use peremptory challenges, while respecting the integrity of the verdicts rendered by juries of this state.

The dissent draws support for its position from the United States Supreme Court's decisions in Ross v. Oklahoma, 487 U.S. 81 (1988), and United States v. Martinez-Salazar, 528 U.S. 304 (2000). The dissent posits that these cases make clear that there is no federal constitutional right to peremptory challenges, and that the denial of these challenges does not constitute reversible error absent a showing that a legally objectionable juror served on the jury. We are aware of the holdings in both cases cited by the dissent, but ultimately determine that they have little impact on how this Court should interpret Florida's constitutional safeguards

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10. Bolin v. State, 869 So.2d 1196, 1200 (Fla. 2004); Kokal v. Dugger, 718 So.2d 138, 142 (Fla. 1998); Kearse v. State, 662 So.2d 677, 683 (Fla. 1995); Pietri v. State, 644 So.2d 1347, 1352 (Fla. 1994); Knowles v. State, 632 So.2d 62, 65 (Fla. 1993); Hitchcock v. State, 578 So.2d 685, 689 (Fla. 1992), vacated on other grounds, 505 U.S. 1215 (1990); Penn v. State, 574 So.2d 1079, 1081 (Fla. 1991).

11. Conde v. State, 860 So.2d 930, 941-42 (Fla. 2003); Overton v. State, 801 So.2d 877, 894 (Fla. 2001); Bryant v. State, 656 So.2d 426, 428 (Fla. 1995).

12. Kearse v. State, 770 So.2d 1119, 1128 (Fla. 2000); Van Poyck v. Singletary, 715 So.2d 930, 931 (Fla. 1998); Farina v. State, 679 So.2d 1151, 1153-54 (Fla. 1996); receded from on other grounds by Franqui v. State, 699 So.2d 1312, 1320 (Fla. 1997); Dillbeck v. State, 643 So.2d 1027, 1028 (Fla. 1994).

and the law governing the use of cause and peremptory challenges in the instant context. In so doing, we note that the High Court has never addressed whether the erroneous denial of a cause challenge that is preserved under the Trotter requirements constitutes reversible error.[13]

In Ross v. Oklahoma, 487 U.S. 81 (1988), the Supreme Court considered, in pertinent part, whether the curative use of a peremptory challenge violates the right to trial by an impartial jury guaranteed by the Sixth or Fourteenth Amendments. Noting that the Court had long recognized that peremptory challenges are "not of constitutional dimension," the High Court held that the loss of a peremptory challenge, without more, does not violate the right to an impartial jury. Id. at 88. According to the Ross Court, "So long as they jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." Id.

As the arbiters of the meaning and extent of the safeguards provided under Florida's Constitution, we reiterate that the ability to exercise peremptory challenges as provided under Florida law is

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13. In his concurring opinion in Martinez-Salazar, Justice Souter highlighted the pertinent distinction:

> I write only to suggest that this case does not present the issue whether it is reversible error to refuse to afford a defendant a peremptory challenge beyond the maximum otherwise allowed, when he has used a peremptory challenge to cure an erroneous denial of a challenge for cause and when he shows that he would otherwise use his full complement of peremptory challenges for the noncurative purposes that are the focus of his peremptory right. Martinez-Salazar did not show that, if he had not used his peremptory challenge curatively, he would have used it peremptorily against another juror. He did not ask for a makeup peremptory or object to any juror who sat. Martinez-Salazar simply made a choice to use his peremptory challenge curatively.

Martinez-Salazar, 528 U.S. at 317-18 (Souter, J., concurring).

an essential component to achieving Florida's constitutional guaranty of trial by an impartial jury. See Meade, 85 So.2d at 615. Our decisions requiring a defendant to expend a peremptory challenge to cure an erroneous ruling on a cause challenge does not signal our intent to treat cause and peremptory challenges interchangeably, or to associate peremptory challenges with less significance. To the contrary, we have consistently determined that reversible error occurs to the extent a party if forced to expend a peremptory challenge to cure a wrongly denied cause challenge can show that he or she has exhausted the remaining peremptory challenges, and that an objectionable juror was seated on the ultimate jury panel. See Trotter, 576 So.2d at 692. The harm suffered by the defendant under such a scenario is having been forced to accept a juror he or she would have peremptorily excused but for the need to remedy the trial court's error. See Farias v. State, 540 So.2d 201, 203 (Fla. 3d DCA 1989) ("It is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause since it has the effect of abridging the right to exercise peremptory challenges."); Smith v. State, 463 So.2d 542, 545 (Fla. 5th DCA 1985) (same). We believe the Texas Court of Criminal Appeals eloquently expressed this concept as follows:

> It is the privilege of accused to exclude from service one whom [sic], in his judgment is unacceptable to him. In conferring it, the law gives effect to the natural impulse to eliminate from the jury list not only persons who are rendered incompetent for some of the disqualifying causes named in the statute, but persons, who, by reason of politics, religion, environment, association, or appearance, or by reason of the want of information with reference to them, the accused may object to their service upon the jury to which the disposition of his life or liberty is submitted. In other words, the law fixes the number of challenges and confers upon the accused the right to arbitrarily exercise

> them. This right having been denied the appellant in the instant case, he having exercised all of the challenges the court would permit him to use, and having been forced to try his case before jurors who were objectionable and whom he sought to challenge peremptorily, the verdict of conviction rendered by the jury so selected cannot, we think, with due respect to the law, be held to reflect the result of a fair trial by an impartial jury, which it is the design of our law shall be given to those accused of crime.

Johnson, 43 S.W.3d at 6 (quoting Kerley v. State, 230 S.W. 163, 164-65 (1921)). We agree with the Texas court in concluding that the curative use of a peremptory challenge violates a defendant's right to a trial by impartial jury when that defendant can show that he or she went without the peremptories needed to strike a seated juror.

Moreover, we do not consider persuasive the Ross Court's reasoning with regard to the due process concerns associated with forcing a defendant to expend a peremptory challenge to cure a wrongly denied cause challenge. The Ross Court held that the curative use of a peremptory challenge did not violate due process guarantees because the Oklahoma law at issue required a defendant to cure an erroneous for-cause ruling by exercising a peremptory challenge, and thus the defendant had received all that was due under state law. See 487 U.S. at 89. However, it appears that the Oklahoma statute at issue in Ross required a defendant to expend a curative peremptory, exhaust his or her remaining peremptories, and show that an "incompetent" juror sat on the ultimate panel. See id. The opinion explained that after defense counsel in that case had used a peremptory challenge to remove a juror who should have been removed for cause, he exhausted his peremptory challenges, but did not assert and present a cause challenge to any juror remaining on the panel. See id. at 84. This Oklahoma law apparently required an additional act as a necessary prerequisite to

establishing that an "incompetent" juror served on the panel. Thus, it appears that the defendant in Ross could not have obtained relief under Oklahoma law.

Florida law, on the other hand, requires only that the defendant expend a curative peremptory challenge, exhaust the remaining peremptories, and identify a seated juror whom the defendant otherwise would have peremptorily excused according to established law. Stated another way, Florida law provides defendants a stated number of peremptory challenges, less those necessary to cure erroneously denied cause challenges, so long as the defendant is "made whole" with additional peremptories to the extent he or she seeks to challenge objectionable jurors. If the defendant desires to peremptorily challenge a juror, but is without remaining challenges due to the need to correct the trial court's errors, he has not, according to our interpretations, received "that which state law provides." Id. at 89.

The dissent's recommendation to maintain Trotter's requirements, but to require defendants to show that a seated juror was actually biased, would construct the ultimate Catch-22 for accused individuals in this state. It would be fundamentally unfair to require that a defendant take every step possible to obtain an impartial jury by correcting the trial court's error, and then to deny relief because the defendant has not demonstrated he or she was denied an impartial jury. We could remedy the inequity of this result by jettisoning the Trotter standard altogether in favor of the federal practice, which does not require defendants to expend curative peremptory challenges to preserve the erroneous denial of a cause challenge for review. See Martinez-Salazar, 528 U.S. at 306. However, such a "remedy" would not, in our view, serve the ends of justice. The practice would force the defendant to accept a biased juror as a price of preserving the issue on appeal. As we stated in Trotter, our concern in implementing the existing standard is that a defendant not "stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial." Trotter, 576 So.2d at 693.

Finally, this Court is not swayed by the fact that some state courts have reconsidered their state law in the wake of Ross and Martinez-Salazar, opting to limit reversal to those cases in which a legally objectionable juror sits on the jury. See Dissenting op. at 7. The opposite is also true. Several state courts have declined to extend the analysis in Ross and Martinez-Salazar to their jurisdictions. See LeFebre, 5 P.3d at 308 ("That federal law governing the use of peremptory challenges differs from Colorado law governing the use of peremptory challenges does not alter the effect of Ross when applied to Colorado law."); State v. Santelli, 621 A.2d 222, 224-25 (Vt. 1992) (stating that the prejudice standard would render trial court errors unreviewable by shifting the focus to the qualifications of the juror subject to the lost peremptory instead of the court's error); Johnson, 43 S.W.3d at 6 (disapproving appeals court's reliance on Ross, stating that the decision "does not change the way that the Court of Criminal Appeals has interpreted state law"). We choose not to turn Florida law on hits head with regard to the error corrected here which would unnecessarily occur if we were to adopt the dissenting view.

In fact, it is interesting to note that only a bare majority of state courts require a showing that a biased juror actually sat on the jury panel. Nineteen other states in addition to Florida require reversal when a defendant is wrongly denied the use of a peremptory challenge.[14] Many of these jurisdictions apply a

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14. People v. Crittenden, 885 P.2d 887,907 (Cal. 1995); People v. LeFebre, 5 P.3d 295, 307 (Colo. 2000); State v. Kauhi, 948 P.2d 1036, 1038 (Haw. 1997); Thomas, 864 S.W.2d at 259; State v. Albano, 111 A. 753, 753 (Me. 1920); Commonwealth v. Auguste, 605 N.E.2d 819, 824 (Mass. 1992); State v. Freshment, 43 P.3d 968, 975 (Mont. 2002); Fuson v. State, 735 P.2d 1138, 1141 (N.M. 1987); State v. Conner, 440 S.E.2d 826, 634 (N.C. 1994); State v. Tyler, 553 N.E.2d 576, 587 (Ohio 1990), superseded on other grounds by constitutional amendment as stated in State v. Smith, 684 N.E.2d 668 (Ohio 1997); Commonwealth v. Impellizzeri, 661 A.2d 422, 426-27 (Pa. 1995); Johnson v. State, 43 S.W.3d 1, 5-6 (Tex. Crim. App. 2001); State v. Santelli, 621 A.2d 222, 224 (Vt. 1992).

The Court acknowledges that in six of the nineteen jurisdictions, reversal is required because peremptory challenges are either a constitutional

standard similar to that applied in Florida, requiring that the defendant identify a juror he or she would have excused with a peremptory challenge, had one been available.[15] However, many states have even more lenient standards, requiring only that the defendant exhaust his or her peremptory challenges.[16]

Ultimately, we perceive no justifiable reason for receding from the Trotter standard. While not expressly provided for in

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right or because state law either requires reversal or provides that the parties can exercise their peremptories against a panel where none of the jurors are subject to challenges for cause. See State v. Esposito, 613 A.2d 242, 249-50 (Conn. 1992) (right to use peremptories guaranteed by state constitution); Kirkland v. State, 560 S.E.2d 6, 8 (Ga. 2002) (statutory right to exercise peremptories against a panel free from exception); State v. Cross, 658 So.2d 683, 686 (La. 1995) (right to use peremptories guaranteed by state constitution); People v. Cahill, 809 N.E.2d 561 (N.Y. 2003) (statute provides that reversal is warranted for erroneous denial of for-cause challenge when defendant exhausts peremptory challenges); David v. Commonwealth, 493 S.E.2d 379, 381 (Va. Ct. App. 1997) (statutory right to exercise peremptory strikes against a panel free from exception); State v. Phillips, 461 S.E.2d 75, 94 (W. Va. 1995) (accepting the constitutional analysis contained in Ross but upholding per se reversal based on statutory right to exercise peremptories against a panel free from exception).

15. Albano, 111 A. at 753 (requiring exhaustion of peremptory challenges and the seating of an "objectionable" juror); Johnson, 43 S.W.3d a at 5-6 (requiring exhaustion of peremptory challenges, denial of request for additional peremptories, and identification of a seated juror who is objectionable); Santelli, 621 A.2d at 224 (requiring exhaustion of peremptory challenges and communication of the desire to peremptorily challenge another juror).

16. Crittenden, 885 P.2d at 907 (requiring exhaustion of peremptory challenges and communication to the trial court that the defendant is dissatisfied with the jury selected); LeFebre, 5 P.3d at 307 (requiring exhaustion of peremptory challenges); Kauhi, 948 P.2d at 1039 (applying a true "per se" standard requiring reversal whenever a defendant is forced to use a peremptory challenge to remove a juror who should have been removed for cause); Thomas, 864 S.W.2d at 259 (requiring exhaustion of peremptory challenges); Auguste, 605 N.E.2d at 824 (same); Freshment, 43 P.3d 968 at 975 (same); Fuson, 735 P.2d at 1141 (same); Tyler, 553 N.E.2d at 587 (same); Impellizzeri, 661 A.2d at 426-27 (same).

Florida's Constitution, peremptory challenges are a necessary took for achieving the constitutional right of a trial by an impartial jury. We are willing to demand that defendants use that took to correct erroneous rulings on cause challenges, but to do so without replacement of the peremptory challenges utilized would, under the jurisprudence of this state, abridge the rights of the accused. We believe the Trotter standard continues to serve as the best mechanism for ensuring that such abridgment does not occur.

CONCLUSION

For the reasons stated herein, we reverse Busby's conviction, vacate his sentence, and remand the case for a new trial consistent with this opinion.

It is so ordered.

PARIENTE, C.J., and ANSTEAD, LEWIS and QUINCE, JJ., concur.
BELL, J., concurs in part and dissents in part with an opinion, in which WELLS and CANTERO, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

BELL, J., concurring in part and dissenting in part.

I agree with the majority's holding that the trial judge should have granted Busby's cause challenge to venireperson Lapan. However, because Busby has not shown that his procedural error harmed his constitutional right to a fair and impartial jury, I dissent to the reversal of the conviction.

Indeed, the trial judge made an error in his ruling on one of Busby's eight cause challenges.[17] Such mistakes are made by the best of judges in the fast-paced, contentious process of jury selection. And Busby corrected this error by using the tool the State provided him to immediately remedy such inevitable mistakes. He did so by using one of the ten statutory peremptory challenges given to him in section 913.08(1)(a), Florida Statutes (2000). Later, after exhausting all of his statutory peremptory challenges on jurors who were not removable for cause, Busby tried to recoup the peremptory challenge he used on Lapan by requesting an additional peremptory. He wanted to use this additional peremptory challenge to strike a legally unobjectionable juror.

Ultimately, Busby received what our federal and state constitutions guarantee him. He received a trial by a fair and impartial panel of twelve jurors who reached a unanimous verdict. Each juror was qualified to serve. Not one of them was legally objectionable. Nonetheless, the majority vitiates this jury's verdict; and it does so without requiring Busby to show any harm. The only basis for this severe sanction is the continued application of the Trotter per se error rule.

To explain these four deficiencies of the Trotter per se error rule, I will start with a brief review of the legal history of peremptory challenges. We will see that the per se error rule was a reaction to dicta in the United States Supreme Court decision in

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17. And, as we consider this one procedural error in light of Trotter v. State, 576 So.2d 691 (Fla. 1991), we should not lose sight of its context. The entire mechanism of jury selection worked to achieve the ultimate objective, a fair and impartial jury. Busby challenged eight potential jurors for cause: four of these challenges were granted, four were denied. Only the one denial related to Lapan was in error. Prior to Busby making his challenges for cause, the trial court removed twelve jurors sua sponte. The State also successfully removed six jurors for cause. Two of the State's cause challenges removed jurors biased against Busby and in favor of the State. In addition to these successful cause challenges, Busby used all ten of his peremptory challenges (plus one on an alternate) while the State used nine of its ten peremptory challenges. In the end, no objectionable juror was empaneled.

Swain v. Alabama, 380 U.S. 202 (1965), where that Court stated that the federal constitution demanded such a strict standard. However the United States Supreme Court later clarified this dicta in Ross v. Oklahoma, 487 U.S. 81 (1988), when it held that a per se reversal rule in not constitutionally required. We will also see that Florida law on the legal significance of peremptory challenges was consistent with the legal significance accorded them by the United States Supreme Court prior to Swain, adjusted course post-Swain, but failed to correct course after that Court reversed itself. This historical examination also will show that post-Trotter developments removed any firm legal basis to support a per se reversible error rule.

After this examination of the legal history, I will briefly discuss the majority opinion. Essentially, the majority gives peremptory challenges an elevated status beyond what is typically given to nonconstitutional, statutory procedural rights. We will see that this elevated status of peremptory challenges is contrary to this Court's precedents.

Essentially, I will show that modifying the Trotter standard to require a showing of harm is most consistent with the historically understood purpose of peremptory challenges as procedural tools of no constitutional dimension that are designed to help the State fulfill its constitutional duty of providing fair and impartial juries to all parties.[18] And, because peremptory challenges are of no constitutional dimension, section 924.33, as well as our precedent, require application of the harmless error standard of review.

I. A BRIEF HISTORY OF PEREMPTORY CHALLENGES

A. THE LAW PRIOR TO TROTTER

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18. Art. I, § 22, Fla. Const.

Peremptory challenges have had a long and storied history.[19] This Court has consistently recognized that these challenges are not of constitutional dimension but are a means to ensure that defendants receive an impartial jury. See Carroll v. State, 190 So. 437, 438 (Fla. 1939).

In Rollins v. State, 148 So.2d 274, 276 (Fla. 1963), this Court refused to reverse a conviction based on an erroneous denial of a cause challenge because a peremptory challenge was used on the objectionable venireperson. As Busby did, Rollins exhausted his peremptory challenges, but this Court held that there was no showing that an objectionable or unqualified juror served on the jury. This Court defined "objectionable" juror as one that is legally objectionable or unqualified to serve. Id.

In Swain, 380 U.S. at 219, the United States Supreme Court stated in dicta that the "denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice." This Court applied the Swain dicta in Hill v. State, 477 So.2d 553 (Fla. 1985). The trial court in Hill erroneously denied a cause challenge, and Hill used a peremptory on the objectionable venireperson. With little analysis, this Court stated:

> We find that such error cannot be harmless because it abridged appellant's right to peremptory challenges by reducing the number of those challenges available him. Florida and most other jurisdictions adhere to the general rule that it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory

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19. A detailed history of peremptory challenges is provided in William T. Pizzi & Morris B. Hoffman, Jury Selection Errors on Appeal, 38 Am. Crim. L. Rev. 1391, 1403-06 (2001).

> challenges and an additional challenge is sought and denied. See Singer[v. State, 109 So.2d 7 (Fla. 1959)]; Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981). See also Wasko v. Frankel, 116 Ariz. 288, 569 P.2d 230 (Ariz. 1977); Jones v. Cloud, 119 Ga. App. 697, 168 S.E.2d 598 (Ga. 1969); State v. Sugar, 408 So.2d 1329 (La. 1982); State v. Ternes, 259 N.W.2d 296 (N.D. 1977), cert. denied, 435 U.S. 944, 98 S.Ct. 1524, 55 L.Ed.2d 540 (1978); Commonwealth v. Jones, 477 Pa. 164, 383 A.2d 874 (Pa. 1978); Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (Va. 1980).

Hill, 477 So.2d at 556. The majority of the cases cited in Hill cite to Swain as authority. This Court did not provide a state constitutional or statutory law basis for its holding in Hill. Thus, the most reasonable inference is that the decision was based on federal constitutional requirements in light of Swain.

Four years later, this Court considered a similar situation in Hamilton v. State, 547 So.2d 630 (Fla. 1989). The trial court in Hamilton erroneously denied a cause challenge to a juror. Although Hamilton could have used one of his remaining peremptory challenges to remove the challenged juror, he elected not to do so. At the conclusion of voir dire, after Hamilton had exhausted his peremptory challenges, he requested an additional peremptory challenge so he could backstrike the juror. The request was denied, and the biased juror sat on the panel that issued a verdict in the case. This Court held that "the failure to excuse this juror upon motion deprived Hamilton of his constitutional right to a fair trial, requiring us to reverse the conviction and remand this case for a new trial." Hamilton, 547 So.2d at 633. Hamilton differs from Hill in that a legally objectionable juror actually served on the jury in Hamilton.

Twenty-three years after Swain was decided (but only three years after Hill), the United States Supreme Court confronted the

question before us in Ross v. Oklahoma, 487 U.S. 81 (1988). The Court addressed Ross's arguments based on federal constitutional rights and then on state law. First, the Court held that peremptory challenges are not of federal constitutional dimension and rejected the argument that, without more, "the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." Id. at 88. The Court concluded that, because peremptory challenges are only a means to achieve the end of an impartial jury, whether a litigant is "forced" or "required" to exercise a peremptory challenge does not violate the Sixth Amendment so long as the jury that sits is impartial. See id. at 88.

Second, the Court considered and rejected Ross's argument that the trial court's failure to remove a juror for cause "violated his Fourteenth Amendment right to due process by arbitrarily depriving him of the full complement of nine peremptory challenges allowed" under state law. Id. at 89. The facts in Ross are nearly identical to those in this case, and the Oklahoma law is very similar to Florida law in that a defendant who disagrees with a trial court's ruling on a cause challenge must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise a peremptory challenge to remove the juror. The Court held that such a requirement is consistent with the ultimate goal of empaneling an impartial jury. Id. Thus, the Court concluded that Ross did not lose any state law right when he used one of his challenges to remove a juror who should have been excused for cause. Instead, the Court held that Ross received all the state law allowed him and received the fair trial guaranteed by the federal constitution. Id. at 90-91. And, contrary to the majority's position in this case, the Court in Ross found that this blurring of the distinction between peremptory and cause challenges did not violate Oklahoma law nor did it violate Ross's due process rights. However, the Court did tacitly acknowledged that repeated and deliberate misapplication of the

law by the trial court might rise to the level of a due process violation. See id. at 91 n.5.[20]

B. THE TROTTER STANDARD

In Trotter v. State, 576 So.2d 691 (Fla. 1991), this Court held:

> Where a defendant seeks reversal based on a claim that he was forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenges for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted.

Trotter, 576 So.2d at 693. We have interpreted Trotter not to require an actual showing of bias or partiality on the part of the juror.[21] Thus, the mere objection to any juror who actually sits on

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20. And, on this point, I share the important but purely hypothetical concern the majority raises in its objection to my suggestion that the Trotter standard be modified. A trial court's repeated and deliberate denial of appropriate challenges for cause would be a violation of both federal and state law. But, just as in Ross, that is clearly not the case before us now and it is an unsupported, insufficient reason for a global, per se reversible error rule. Except for the majority's concerns stated in opposition to modifying the Trotter standard, the abusive denial of proper cause challenges by trial judges has never been articulated by this Court as a reason for the per se reversal rule, nor is there any factual support for such a rationale. The majority does not cite to any evidence that abusive denial of cause challenges was a problem before Trotter, and there is no evidence to support the existence of such a problem in those jurisdictions that require the showing of harm.

21. See Conde v. State, 860 So.2d 930, 941 (Fla. 2003); Pietri v. State, 644 So.2d 1347, 1352 (Fla. 1994); Knowles v. State, 632 So.2d 62, 65 (Fla. 1993).

the jury is sufficient to warrant automatic reversal. Under this standard, a defendant could object to a clearly neutral or even a defense-friendly juror and still be entitled to a new trial. As Judge Harris noted, "Trotter, in effect, grants a reversal of even a fair verdict in order to reward a party for properly following the procedure to preserve the error." Gootee v. Clevinger, 778 So.2d 1005, 1013 (Fla. 5th DCA 2000) (Harris, J., dissenting). Importantly, neither Trotter nor the cases that it cites provide any state law basis for a per se reversal rule.

C. POST-TROTTER DEVELOPMENTS

In 2000, the United States Supreme Court revisited the constitutional importance of peremptory challenges in United States v. Martinez-Salazar, 528 U.S. 304 (2000). The Court in Martinez-Salazar decided the issue left open in Ross of whether, absent the requirement under the federal rules to use a peremptory challenge to cure an erroneous refusal by the trial court to excuse jurors for cause, "a denial or impairment of the exercise of peremptory challenges occurs if the defendant uses one or more challenges to remove jurors who should have been excused for cause." Ross, 487 U.S. at 91 n.4. The Court determined that Martinez-Salazar's use of a peremptory challenge to cure the trial court's error was consistent with the purpose of peremptory challenges, that is, securing trial by an impartial jury, and was not equivalent to the loss of a peremptory challenge. The Court affirmed the conviction.

It is clear from Ross and Martinez-Salazar that there is no federal constitutional right to peremptory challenges.[22] So, absent a showing that an objectionable juror served on the jury, the so-

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22. As the United States Supreme Court has said, peremptory challenges "are but one state-created means to the constitutional end of an impartial jury and a fair trial." Georgia v. McCollum, 505 U.S. 42, 57 (1992). In fact, that Court "repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." Id. (emphasis added).

called "denial of a full complement of peremptory challenges" arising from the use of a peremptory challenge to cure an erroneous denial of a cause challenge does not constitute reversible error. In addition to there being no federal constitutional right to peremptory challenges, this Court has never established a state constitutional right to peremptory challenges. And, contrary to the majority, I believe we should not do so in this case.

Since the Ross and Martinez-Salazar decisions, many other states have reconsidered their positions on peremptory challenges. The Wisconsin Supreme Court conducted an excellent analysis of peremptory challenge law in State v .Lindell, 629 N.W.2d 223 (Wis. 2001), and reversed that state's long-standing per se error position in light of Ross and Martinez-Salazar. A number of other states have followed suit.[23] In fact, the majority of states currently do not require reversal unless a legally objectionable juror actually served on the jury.

In Florida, at least one appellate judge has asked the right question and reached the correct conclusion. In his dissent in Gootee v. Clevinger, 778 So.2d 1005 (Fla. 5th DCA 2000), Judge Harris posed the question that is at issue in this case: "[I]s the failure to get one's full complement of peremptory challenges itself so prejudicial that a new trial must always be granted?" Gootee, 778 So.2d at 1011 (Harris, J., dissenting). Judge Harris succinctly

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23. See Dailey v. State, 828 So.2d 340 (Ala. 2001); Minch v. State, 934 P.2d 764, 769-70 (Alaska Ct. App. 1997); State v. Hickham, 68 P.3d 418 (Ariz. 2003); Bangs v. State, 998 S.W.2d 738, 744-45 (Ark. 1999); State v. Pelletier, 552 A.2d 805, 810 (Conn. 1989); State v. Ramos, 808 P.2d 1313, 1315 (Idaho 1991); Dye v. State, 717 N.E.2d 5, 18 n. 13 (Ind. 1999); State v. Neuendorf, 509 N.W.2d 743, 747 (Iowa 1993); State v. Anderson, 603 N.W.2d 354, 356 (Minn. Ct. App. 1999) (citing State v. Stufflebean, 329 N.W.2d 314, 317 (Minn. 1983)); Johnson v. State, 754 So.2d 576, 578 (Miss. Ct. App. 2000); State v. Storey, 40 S.W.3d 898, 904-05 (Mo. 2001); State v. Entzi, 615 N.W. 145, 149 (N.D. 2000); Myers v. State, 17 P.3d 1021, 1027-28 (Okla. Crim. App. 2000); Green v. Maynard, 564 S.E.2d 83 (S.C. 2002); State v. Verhoef, 627 N.W.2d 437 (S.D. 2001); State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992); State v. Menzies, 889 P.2d 393, 399-400 (Utah 1994); State v. Fire, 34 P.3d 1218 (Wash. 2001).

answered his question and, in so doing, showed why such a procedural error should be subjected to a harmless error analysis, not per se reversal. Judge Harris said:

> Rollins requires an error which affects the fairness of the verdict; Trotter requires only that there have been an error in ruling on the "for cause" challenge and that (1) the peremptory challenges are exhausted to cure the error, (2) an additional challenge is requested (and denied), (3) for the purpose of challenging a specified juror who ultimately serves on the jury. I submit that although (1), (2), and (3) are essential in order to preserve the error (for without them there would clearly be no harm associated with the court' s error), such preservation factors themselves fail to establish harm. Trotter, in effect, grants a reversal of even a fair verdict in order to reward a party for properly following the procedure to preserve the error. Rollins, Hamilton and Farina[v. State, 679 So.2d 1152 (Fla. 1996),] go further and ask, "Now that you have preserved the error, how have you been harmed?" Only be asking this question will we subject this procedural error, as we do even constitutional errors, to a harmless error analysis.

Gootee, 778 So.2d at 1013 (Harris, J., dissenting) (emphasis added).

I agree with Judge Harris. The Trotter requirements are a necessary - and judicially efficient - means of preserving potentially harmful error. However, this Court's original reliance on Swain to require per se reversal is obviously no longer sustainable.[24] And,

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24. Revealingly, the United States Supreme Court, in Martinez-Salazar, noted - in dicta - that the Swain standard of automatic reversal was itself dicta and that it was founded on "a series of [United States Supreme Court] early cases

because a per se reversal rule no longer has any foundation in the federal constitution, we must look to see what state law demands. To do this, we must first determine the state la source of the right to peremptory challenges and then determine what standard of review to apply when a right from such a source is violated.

II. THE PURELY STATUTORY BASIS OF PEREMPTORY CHALLENGES

Peremptory challenges in Florida are purely a statutory right; they have no state constitutional foundation. In criminal trials, peremptory challenges are granted equally to the State and to the defendant by section 913.08, Florida Statutes (2003). As a statutory right, peremptory challenges are an important means to help ensure that both sides receive their state constitutional right to a fair trial before an impartial jury. But they are of no constitutional dimension. There is no express of implicit provision in Florida's constitution securing the right to peremptory challenges; and to hold otherwise is contrary to our own precedent.

Because peremptory challenges are only a statutory right given to help secure the constitutional right to a fair trial by jury, we are bound to apply a harmless error standard. The harmless error rule as codified in section 924.33, Florida Statutes (2003), and as applied by or own precedent dictates this result. This Court interpreted section 924.33 in State v. DiGuilio, 491 So.2d 1129, 1134 (Fla. 1986), stating:

> Section 924.33 respects the constitutional right to a fair trial free of harmful error but directs appellate courts not to apply a standard of review which requires that trials be free of harmless errors. The authority of the legislature to enact harmless error statutes is unquestioned. Contraposed to this legislative authority, the courts may establish the

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decided long before the adoption of harmless-error review." 528 U.S. at 317 n.4.

> rule that certain errors always violate the right to a fair trial and are, thus, per se reversible. To do so, however, we are obligated to perform a reasoned analysis which shows that this is true, and that, for constitutional reasons, we must override the legislative decision.

(Original emphasis and footnote omitted; emphasis added). In light of section 924.33, our statements in DiGuilio, and our historical application of the harmless error rule, I see no constitutional reason that supports a per se reversal rule in general or as applied in this case. As I have said, it is clear that Busby's constitutional right to an impartial jury was not violated. None of this jurors were legally objectionable. Because there is no federal constitutional right to peremptory challenges and because this Court's own precedent makes it clear that these challenges are not of a constitutional dimension, to require per se reversal in a case where a party receives what the constitution requires violates section 924.33 as interpreted by this Court in DiGuilio.[25]

III. THE MAJORITY OPINION

For the first time in Florida's long history, the majority announces that the right to peremptory challenges is constitutionally based. In doing so, the majority misapprehends the true constitutional right at issue and contradicts our previous case law to the contrary. As this Court stated in the post-Trotter case of Jefferson v. State, 595 So.2d 38, 41 (Fla. 1992), "It is the right to an impartial jury, not the right to peremptory challenges, that is constitutionally protected. Peremptory challenges merely are a 'means of assuring the selection of a qualified and unbiased jury.'" (Citations omitted; emphasis added).

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25. See Jefferson v. State, 595 So.2d 38, 41 (Fla. 1992); State v. Neil, 457 So.2d 481, 486 (Fla. 1984); Carroll v. State, 190 So. 437, 438 (Fla. 1939).

By the majority's decision today, the historical purpose and primary role of peremptory challenges have been lost. As I have suggested earlier, "if peremptory challenges have any constitutional significance at all, it must be because they serve as a check on the trial court's erroneous rulings on challenges for cause, and therefore act as a screen to increase the chances that biased jurors will not sit." William T. Pizzi & Morris B. Hoffman, Jury Selection Errors on Appeal, 38 Am. Crim. L. Rev. 1391, 1429 (2001); see also Martinez-Salazar, 528 U.S. at 319 (Scalia, J., concurring in the judgment) ("The resolution of juror-bias questions is never clear cut, and it may well be regarded as one of the very purposes of peremptory challenges to enable the defendant to correct judicial error on the point."). Instead of serving as a means to correct erroneous rulings on cause challenges, and thereby reducing the number of appeals needed to ensure an impartial jury, peremptory challenges in Florida have now evolved into another "constitutionally required" aspect of a jury trial for which per se reversal is applied. In light of this enormous step, I must reiterate the point that seems lost in the majority's decision. The constitutional provision that the majority must base its decision on is the constitutional right to an impartial jury. If Busby's jury was impartial, how can one say that his constitutional right to an impartial jury was violated?

A. THE MAJORITY CONCERNS

In various ways, the majority insists that modifying the per se rule of Trotter would be disastrous. The majority maintains that modifying the Trotter standard to require proof of actual harm for a conviction to be reversed would compromise the constitutional right to trial by an impartial jury. Respectfully, these statements are without substantive support. They are not supported by either the express rationale of prior cases from this Court, extrajudicial studies, or even anecdotal evidence that show a per se error rule is necessary to avoid impairing a party's state constitutional right to trial by jury was impaired by the harmless error standard prior to Hill or Trotter. What evidence is there of any such impairment in

the federal system or the majority of other states that require the proof of harm?

The majority says that "the curative use of a peremptory violates a defendant's right to a trial by impartial jury when that defendant can show that he or she went without the peremptories needed to strike a seated juror." Majority op. at 26-27. This begs the real constitutional question. Unless this "seated juror" is shown to be partial, how is the defendant's constitutional right to trial by an impartial jury deemed violated? The majority's conclusion that the mere "loss" of a peremptory challenge is always a violation of the right to a trial by an impartial jury can only be true if (1) that "seated juror" is always deemed partial and (2) one ignores the historical fact that correcting judicial errors "on the spot" is a primary reason peremptories were originally granted to parties. Since I have already addressed the historical purpose of peremptory challenges, I will speak only to the first part. Without a requirement to show that the "seated juror" was objectionable, one must either totally ignore the rebuttable presumption that a juror is impartial or one must turn this presumption on its head. To do either flies in the face of previous statements by this Court and the United States Supreme Court that there is a rebuttable presumption that jurors are impartial. Irvin v. Dowd, 366 U.S. 717, 723 (1961); Kessler v. State, 752 So.2d 545, 552 (Fla. 1999) (quoting Bundy v. State, 471 So.2d 9, 19-20 (Fla. 1985)).

Lastly, in its most extraordinary justification for maintaining the per se error rule, the majority says it is concerned that a defendant required to show harm could lose the ability to exercise all peremptories in situations where the trial court wrongly, although not purposefully, denies cause challenges equal to the number of peremptories granted and that without the Trotter per se reversal rule the defendant would have no remedy. I find nothing to support this concern. As I noted earlier, there is not evidence that any such problems have ever existed in Florida's trial courts. See supra note 4. And this concern is completely unsupported in the record before us. There is nothing in the

selection of Busby's jury that even hints at any such injustice. See supra note 1. Absent any historical or record support for the concern about the wholesale loss of peremptories, I believe we should exercise the same restraint that the United States Supreme Court exercised sixteen years ago in Ross v. Oklahoma, 487 U.S. 81, n.5 (1988), and not answer a question that is not before us. In Ross, the United States Supreme Court left this exact question open, and it has not had to address this open question since. Respectfully, we should exercise the same restraint.

B. THE IMPACT OF TROTTER

What has been the true impact of Trotter's per se error standard? I agree with the majority's analysis of the decision in which this Court has addressed denial of cause challenges under Trotter. These decisions demonstrate that this Court's application of the Trotter standard is not responsible for the "multitudes of defendants seeking a new trial because of erroneously denied cause challenges." Nevertheless, this analysis ignores the impact of the per se reversal rule at the intermediate appellate court level. There are a significant number of cases where Florida district courts of appeal have reversed convictions and ordered new trials where defendants arguably received a trial by a fair and impartial jury.[26] These reversals illustrate the point that "constitutionalizing the impairment of peremptory challenges" runs counter to the Court's decision in Ross and is hardly "inconsequential" in view of the reality that "[t]rial courts . . . rule on cause challenges by the minute," United States v. Martinez-Salazar, 146 F.3d 653, 661 (9th Cir. 1998) (Rymer, J., concurring in part and dissenting in part),

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26. For a representative sample of reversals, see, e.g., Bell v. State, 870 So.2d 893 (Fla. 4th DCA 2004); Rodas v. State, 821 So.2d 1150 (Fla. 4th DCA 2002); Rodriguez v. State, 816 So.2d 805 (Fla. 3d DCA 2002); Taylor v. State, 796 So.2d 570 (Fla. 2d DCA 2001); Mobley v. Staet, 774 So.2d 782 (Fla. 2d DCA 2000); Hall v. State, 682 So.2d 208 (Fla. 2d DCA 1996); Davis v. State, 656 So.2d 560 (Fla. 4th DCA 1995); Diaz v. State, 608 So.2d 888 (Fla. 3d DCA 1992); Street v. State, 592 So.2d 369 (Fla. 4th DCA 1992); Henry v. State, 586 So.2d 1335 (Fla. 3d DCA 1991).

quoted in United States v. Martinez-Salazar, 528 U.S. at 316, "often between shades of gray." Id.

The real irony of the majority's approach is that despite the success of the peremptory challenge mechanism in helping to achieve the ultimate goal of a fair and impartial jury, reaching this goal is actually impaired by the Trotter per se reversal rule because it forces trial courts to retry cases previously decided by fair and impartial juries. Busby is just another example where on harmless error is the basis for reversing a trial by a fair and impartial jury. Such reversals are "costly to the victims and to the judicial system," State v. Hickham, 68 P.3d 418, 426 (Ariz. 2003), and "give[] a strong incentive to . . . state legislators to cut down the number of peremptories - or eliminate them altogether." United States v. Annigoni, 96 F.3d 1132, 1150 (9th Cir. 1996) (Kozinski, J., dissenting).

IV. MODIFICATIONS TO THE TROTTER STANDARD

Because there is no federal or state constitutional right to peremptory challenges, I believe we are bound to modify the per se reversal rule that this Court has interpreted Trotter to require. As we acknowledged in DiGuilio, absent a legitimate constitutional reason to override the legislative codification of the harmless error rule in section 924.33, we must require that a defendant show actual harm in order for a conviction to be reversed. DiGuilio, 491 So.2d at 1134. In other words, the defendant must meet the Trotter standards and must show that the juror identified as being "objectionable" was indeed a legally objectionable juror, i.e., a biased or partial juror. If the defendant makes such a showing, then harm has been proven and a violation of the defendant's constitutional right to a fair trial has been established. In such a case, the defendant would be entitled to a new trial. If the juror identified by the defendant as being objectionable is in actuality not legally objectionable, the defendant has suffered no harm and is not entitled to a new trial because any error in denying the challenge for cause was rendered harmless.

V. APPLICATION TO BUSBY'S CASE

After the trial court erroneously denied Busby's challenge for cause, Busby identified jurors Liebel and Winston as "objectionable jurors." However, Busby did not challenge either of these jurors for cause. Liebel was dismissed during the trial and therefore did not serve on the final jury and is of no consequence. Busby objected to Winston because Winston's son was a correctional officer. Winston repeatedly stated that he could be impartial and would not be influenced by his son's occupation. Clearly, Winston was not a legally objectionable juror. Therefore, Busby received what the constitution guarantees, a fair trial by an impartial jury. The good-faith mistake made by the trial court in denying Busby's cause challenge to Lapan was corrected by the took granted by the state to remedy such errors made "in the heat of the battle."

VI. CONCLUSION

Although the challenge for cause of venireperson Lapan should have been granted, no legally objectionable juror served on the jury, and it is clear that Busby received a fair trial by an impartial jury. For this reason, I would not reverse Busby's conviction but would instead consider the merits of the other issues he presents.

WELLS and CANTERO, JJ., concur.

An Appeal from the Circuit Court in and for Columbia County,

E. Vernon Douglas, Judge - Case No. 00-897CF

Nancy A. Daniels, Public Defender and David A. Davis, Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida,

for Appellant

Charles J. Crist, Jr., Attorney General and Cassandra K. Dolgin, Assistant Attorney General, Tallahassee, Florida,

for Appellee

SUPREME COURT OF FLORIDA

THURSDAY, FEBRUARY 3, 2005

CASE NO.: SC02-1364
Lower Tribunal No.: 00-897CFB

ANDREW DARRYL BUSBY vs. STATE OF FLORIDA
Appellant Appellee

In light of the revised opinion, the Appellee's Motion for Rehearing is hereby denied.

PARIENTE, C.J., and ANSTEAD, LEWIS, QUINCE, and BELL, JJ., concur.
WELLS and CANTERO, JJ., dissent.

A True Copy
Test:

Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

jn
Served:

DAVID A. DAVIS GEORGE ROBERT DEKLE, SR.
CASSANDRA K. DOLGIN CAROLYN M. SNURKOWSKI
HON. E. VERNON DOUGLAS, JUDGE

IN THE SUPREME COURT OF FLORIDA

ANDREW DARRYL BUSBY,

Appellant,

v. CASE NO. **SCO2-1364**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **THIRD** JUDICIAL CIRCUIT,
IN AND FOR **COLUMBIA** COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

SUMMARY OF ARGUMENT 12

ARGUMENT

I. THE COURT ERRED IN REFUSING TO GRANT BUSBY'S CAUSE CHALLENGES TO PROSPECTIVE JUROR KIM LAPAN, A FORMER GUARD OF DEATH ROW PRISONERS AND ONE WHO HAD A BIAS AGAINST THEM, WHICH FORCED HI TO USE A PEREMPTORY CHALLENGE TO KEEP HIM OFF HIS JURY, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS 19

II. THE COURT ERRED IN EXCLUDING THE TESTIMONY OF MARTHA JOBSON, A SOCIAL WORKER, WHO WOULD HAVE TESTIFIED THAT BUSBY SUFFERED FROM POST-TRAUMATIC STRESS DISORDER, WHERE SUCH EVIDENCE WOULD HAVE SUPPORTED AND JUSTIFIED A DEFENSE OF SELF-DEFENSE, A VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 28

TABLE OF CONTENTS

(Continued)

Page

ARGUMENT

III. THE COURT ERRED IN ALLOWING STATE ATTORNEY INVESTIGATOR LISA LONG TO TESTIFY THAT SHE SAW BUSBY MAKE SOME HAND GESTURES DURING THE TESTIMONY OF CHARLES GLOBE, AND IT ALSO ERRED IN ALLOWING THE STATE TO READ, AS SUBSTANTIVE EVIDENCE OF GUILT, THE TESTIMONY OF ANDREW BUSBY WHEN HE TOOK THE STAND AFTER LONG ONLY TO EXPLAIN THE GESTURES, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS 43

IV. THE COURT ERRED IN REFUSING TO GIVE BUSBY HIS DUE PROCESS RIGHT TO PRESENT HIS DEFENSE IN THE WAY HE CHOSE WHEN IT REFUSED TO LET HIS CO-DEFENDANT, CHARLES GLOBE, TESTIFY BEFORE THE JURY LIVE AND IN PERSON, BUT INSISTED HE DO SO ONLY BY VIDEOTAPE, A VIOLATION OF BUSBY'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS 50

V. THE COURT ERRED IN DENYING BUSBY'S MOTION TO SUPPRESS STATEMENTS HE MADE TO LAW ENFORCEMENT OFFICERS AFTER HE TOLD THEM HE DID NOT WANT TO TALK WITH THEM, A VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND HIS RIGHTS UNDER ARTICLE I, SECTION IX OF THE FLORIDA CONSTITUTION 59

TABLE OF CONTENTS

(Continued)

Page

ARGUMENT

VI. THE COURT ERRED IN ADMITTING, AS WILLIAMS RULE EVIDENCE THAT BUSBY WANTED TO KILL A ROBERTO ROSA AND ALPHONSO PALMER, A VIOLATION OF THE DEFENDANT'S CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR TRIAL 66

VII. THE COURT ERRED IN ADMITTING A TRANSCRIPT OF BUSBY'S JULY 7, 2000 CONFESSION RATHER THAN THE ORIGINAL AUDIOTAPE OF THAT STATEMENT, A VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL . 73

VIII. THE COURT ERRED IN FINDING BUSBY MURDERED ELTON ARD IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, A VIOLATION OF THE DEFENDANT'S EIGHTH AMENDMENT RIGHTS 79

IX. THE COURT ERRED IN REFUSING TO ADMIT SEVERAL EXHIBITS BUSBY OFFERED DURING THE PENALTY PHASE PORTION OF HIS TRIAL, WHICH WOULD HAVE HELPED THE JURY UNDERSTAND WHY HE HAD BEEN DIAGNOSED AS SUFFERING FROM POST TRAUMATIC STRESS DISORDER, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS 83

TABLE OF CONTENTS

(Continued)

Page

ARGUMENT

X. THE COURT ERRED IN ADMITTING A LETTER BUSBY OSTENSIBLY WROTE TO CHARLES GLOBE BECAUSE ITS PREJUDICIAL VALUE SUBSTANTIALLY OUTWEIGHED ITS LIMITED RELEVANCE, A VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL 87

XI. THE COURT ERRED IN SENTENCING BUSBY TO DEATH BECAUSE SECTION 921.141 FLORIDA STATUTES UNCONSTITUTIONALLY ALLOWED THE TRIAL COURT TO SENTENCE HIM TO DO SO WITHOUT, AMONG OTHER THINGS, A UNANIMOUS DEATH RECOMMENDATION FROM THE JURY 89

XII. THE COURT ERRED IN ALLOWING THE STATE TO PRESENT EVIDENCE BEYOND THE FACT THAT BUSBY HAD TWO PRIOR FIRST DEGREE MURDER CONVICTIONS IN SUPPORT OF THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR, A VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS 93

XIII. THE TRIAL COURT ERRED IN REPEATEDLY INSTRUCTING THE JURY THAT THEIR RECOMMENDATION WAS JUST THAT, A RECOMMENDATION, A VIOLATION OF BUSBY'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS 95

TABLE OF CONTENTS

(Continued)

Page

CONCLUSION 98

CERTIFICATE OF SERVICE 98

CERTIFICATE OF FONT SIZE 99

TABLE OF CITATIONS

CASES **PAGE(S)**

Ake v. Oklahoma, 470 U.S. 68 (1985) 91

Alberti v. Klevenhagen,
790 F.2d 1220, 1222 (5th Cir.) clarified,
799 F.2d 992 (5th Cir. 1986) 38

Allen v. State, 492 So.2d 803 (Fla. 1st DCA 1986) 77

Alston v. State, 723 So.2d 148 (Fla. 1998) 80

Alvord v. State, 322 So.2d 533 (Fla. 1975) 90

Amoros v. State, 531 So.2d 1256 (Fla. 1988) 87

Apprendi v. United States, 530 U.S. 466 (2000) 2,89

Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) 90,96

Bradley v. State, 787 So.2d 732, 742 (Fla. 2001) 70,71

Brown v. State, 728 So.2d 758 (Fla. 3rd DCA 1999) 25

Brown v. State, 719 So.2d 882 (Fla. 1998) 93

Burns v. State, 699 So.2d 646 (Fla. 1997) 96

Caldwell v. Mississippi, 472 U.S. 320 (1985) 18,95,96,97

Carratelli v. State,
27 Fla.L.Weekly D2510 (Fla. 4th DCA November 20, 2002) . 23

Chestnut v. State, 538 So.2d 820 (Fla. 1989) 36

Christian v. State, 550 So.2d 450 (Fla. 1989) 39,80,81,82

Coolen v. State, 696 So.2d 738 (Fla. 1997) 70,71

Cox v. State, 819 So.2d 705 (Fla. 2002) 39,93,94

Coy v. Iowa, 487 U.S. 1012 (1988) 51

David v. Brown, 774 So.2d 775 (Fla. 4th DCA 2000) 70

Demps v. State, 395 So.2d 501 (Fla. 1981) 39

Dillbeck v. State, 643 So.2d 1027 (Fla. 1994) 36

Duggan v. State, 189 So.2d 890 (Fla. 1st DCA 1966) 76,77

Eddings v. Oklahoma, 455 U.S. 104 (1982) 91

Espinosa v. Florida, 505 U.S. 1079 (1992) 91

Estes v. Texas, 381 U.S. 532 (1965) 53

Evans v. State, 800 So.2d 182 (Fla. 2001) 90

Farmer v. Brennan, 511 U.S. 825 (1994) 37,38

Furman v. Georgia, 408 U.S. 238 (1972) 90

Gardner v. Florida, 407 U.S. 349 (1977) 91

Garron v. State, 528 So.2d 353 (Fla. 1988) 58

Geldrich v. State, 763 So.2d 1114 (Fla. 4th DCA 1999) 67

Griffin v. State, 639 So.2d 966 (Fla. 1994) 70,71

Halliwell v. State, 323 So.2d 557 (Fla. 1975) 78

Hansen v. State, 585 So.2d 1057 (Fla. 1st DCA 1991) 58

Harrell v. State, 709 So.2d 1364 (Fla. 1998) 52,56

Harris v. State, 619 So.2d 340 (Fla. 1st DCA 1993) 77

Hassine v. Jeffes, 846 F.2d 169 (3d Cir. 1988) 38

Hawthorne v. State, 408 So.2d 80 (Fla. 1st DCA 1982) 35,36

Hayes v . State, 581 So.2d 121 (Fla. 1991) 45,46

Heuring v. State, 513 So.2d 122 (Fla. 1987) 68

Hill v. State, 477 So.2d 553 (Fla. 1985) 26

Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971) 38

Hunt v. State, 746 So.2d 559 (Fla. 1st DCA 1999) 76

Jacobs v. State, 800 So.2d 322 (Fla. 3rd DCA 2001) 56

Johnson v. Louisiana, 406 U.S. 356 (1972) 90,91

Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) 38

Jones v. State, 346 So.2d 639 (Fla. ____ DCA 1977) 65

Kerestesy v. State, 760 So 2d 989 (Fla. 2d DCA 2000) 25

Kilgore v. State, 688 So.2d 895 (Fla. 1996) 39

Kormondy v. State, Case No SC 96197 (Fla. Feb. 13, 2003) . 90

Lockett v. Ohio, 438 U.S. 586 (1978) 91

Lusk v. State, 446 So.2d 1038 (Fla. 1984) 39

Mann v. State, 420 So.2d 578 (Fla. 1982) 91

Martinez v. State, 761 So.2d 1074 (Fla. 2000) 74,75,77

Maryland v. Craig, 497 U.S. 836 (1990) 51,52

Masterson v. State, 516 So.2d 256 (Fla. 1987) 35

Matthews v. State, 772 So.2d 600 (Fla. 5th DCA 2000) 88

McGill v. Duckworth, 944 F.2d 344 (7th Cir. 1991) 38

Mills v. State, 536 So.2d 532 (Fla. 2001) 89

Miranda v. Arizona, 384 U.S. 436,
86 S.Ct 1602, 16 L.Ed.2d 694 (1966) 14,15,60,61,64

Michigan v. Mosely, 423 U.S. 96 (1975) 14,15,60,61,62

Mohammad v. State, 494 So.2d 969 (Fla. 1986) 81

Old Chief v. United States, 519 U.S. 172 (1997) 17,93,94

Pedrero v. Wainwright, 590 F.2d 1383 (5th Cir. 1979) 46

Pentecost v. State, 545 So.2d 861 (Fla. 1989) 19

People v. Gutterndorf, 728 N.E.2d 838 (Ill. 3d DCA 2000) .. 53

Philmore v. State, 820 So.2d 919 (Fla. 2002) 84

Price v. State, 538 So.2d 486 (Fla. 3d DCA 1989) 26

Redman v. County of San Diego,
942 F.2d 1435 (9th Cir. 1991) (en banc) 38

Rhodes v. Chapman, 452 U.S. 337 (1981) 37

Richardson v. State, 246 So.2d 771 (Fla. 1971) 2

Ring v. Arizona, 536 U.S. 584 (2002) 17,89,90,92

Rivers v. State, 458 So.2d 762 (Fla. 1984) 58

Ruffin v. State, 397 So.2d 277 (Fla. 1981) 87

Ruiz v. State, 743 So.2d 1 (Fla. 1999) 88

Salgado v. State, 829 So.2d 342 (Fla. 3rd DCA 2002) 19

Sexton v. State, 775 So.2d 923 (Fla. 2000) 90

Simmons v. United States, 390 U.S. 377 (1968) 45,46,47

Singleton v. State, 783 So.2d 970 (Fla. 2001) 19,24

Skipper v. South Carolina, 476 U.S. 1 (1986) 91

Smith v. United States, 337 U.S. 137 (1949) 48

Sochor v . State, 619 So.2d 285 (Fla. 1993) 96

Spencer v. State, 645 So.2d 377 (Fla. 1994) 84,85

State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) 49,57

State v. Dixon, 283 So.2d 1 (Fla. 1972) 91

State v. Hickson, 630 So.2d 172 (Fla. 1993) 32,35

State v. McClain, 525 So.2d 420 (Fla. 1988) 69

State v. Mizell, 773 So.2d 618 (Fla 1st DCA 2000) 36

State v. Spiegel, 710 So.2d 13 (Fla 3rd DCA 1998) 47,48

State v. Williams, 465 So.2d 1229 (Fla. 1985) 24

Stevens v. State, 419 So.2d 1058 (Fla. 1982) 53,54

Tedder v. State, 322 So.2d 908 (Fla. 1975) 97

Thomas v. State,
28 Fla.L.Weekly S106 (Fla . January 30, 2003) 96

Thomas v. State, 748 So.2d 970 (Fla. 1999) 54

Traylor v. State, 596 So.2d 957 (Fla. 1992) 60,61

Trotter v. State, 576 So.2d 691 (Fla. 1990) 19

Tumulty v. State, 489 So.2d 150 (Fla. 4th DCA 1986) 70,71

United States v. Bailey, 444 U.S. 394 (1980) 37,38,41

United States v. Harris,
__ U.S. __, 112 S.Ct. 2406, 153 L.Ed.2d 524 (2002) 92

United States v. Hitchcock, 922 F.2d 236 (9th Cir. 1993) 46

United States v. Inmon, 568 F.2d 326 (3rd Cir. 1977) 46

Washington v. Texas, 388 U.S. 14 (1967) 47,51

Williams v. State, 638 So.2d 976 (Fla. 4th DCA 1994) 25

Williams v. State, 539 So.2d 563 (Fla. 4th DCA 1989) 70

Williams v. State,
110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847,
80 S.Ct, 1024 L.Ed.2d 86 (1959) 2,66,67

Williamson v. State, 681 So.2d 688 (Fla. 1996) 68

Wilson v. State, 680 So.2d 592 (Fla. 3rd DCA 1996) 76

Withers v. Levine, 615 F.2d 158 (4th Cir. 1980) 38

CONSTITUTIONS AND STATUTES

United States Constitution
Amendment IV 46,48
Amendment V .....
15,45,47,48,60,61

CONSTITUTIONS AND STATUTES

United States Constitution
Amendment VI 14,51,52,90
Amendment XIV 47,60

Florida Statutes (2000)
Section 90.901 75
Section 90.952 75
Section 90.953 75

Florida Statutes (1997)
Section 90.402 67,68,87
Section 90.403 68,87
Section 90.404(2)(a) 67

Florida Statutes
Section921.141 2,89,92,93

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"Values, Ideology, and the Evolution of the Adversary System," 64 Ind. L. J. 303 (1999) 22

Florida Rules of Appellate Procedure

Rule 9.210. 99

Florida Rules of Civil Procedure

Rule 1.30 76

IN THE SUPREME COURT OF FLORIDA

ANDREW DARRYL BUSBY,

Appellant,

v. CASE NO. **SC02-1364**

STATE OF FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant was the defendant in the trial court and will be referred to herein as either "defendant," "appellant ," or by his proper name. References to the record shall be by the volume number in Roman numerals, followed by the appropriate page number, both in parentheses.

STATEMENT OF THE CASE

An Indictment filed in the Circuit Court for Columbia County on August 17, 2000 charged the appellant, Andrew Busby and Charles Globe, with one count of first degree murder (1 R 1). Busby pled not guilty to that charge and over the next several months he, the State, or Globe filed several motions and notices relevant to this appeal:

1. Notice of intent to rely on Williams' Rule evidence, and a notice of objection to it (11 R 2074, 8 R 86). Denied (13 R 2402).

2. Motion to sever defendants' trials (1 R 1467, 1533).

3. Motion for additional peremptory challenges (8 R 1524, 1544). Denied (13 R 2409).

4. Motion for individual and sequestered voir dire (8 R 1550, 1556).

5. Motion to suppress statements (11 R 2075). Denied (13 R 2408).

6. Motion to dismiss the indictment (11 R 2 196). Denied (13 R 2410).

7. Objection to the standard jury instructions and proposed additional or alternative instructions (11 R 2199). Denied (13 R 2403, 2406, 2411).

8. Motion for findings of fact by the jury (12 R 2269). Denied (13 R 2415).

9. Motion to conduct Richardson inquiry (14 R 2781).

10. Motion to declare Section 921.141, Florida Statutes, unconstitutional based on Apprendi v. United States, 530 U.S. 466 (2000). Denied (70 R 201).

11. Motion in limine to prevent mental health defense (16 R 3003). Granted (17 R 3311-12).

12. Notice of intent to rely on a mental health defense other than insanity (17 R 3233).

Busby proceeded to trial before Judge Vernon Douglas. After the State had presented its case, Busby his defense, and the

court the relevant law, jury found him guilty as charged (17 R 3360).

He then proceeded to the penalty phase portion of the trial, and the jury, after hearing the relevant evidence, argument, and law, recommended, by a vote of 11-1, that he die (18 R 3454). The court followed that verdict, and in support of it, the trial judge found the following aggravators:

1. Busby had a prior conviction for two first-degree murders.

2. He was under sentence of imprisonment at the time of the murder.

3. The murder was especially heinous, atrocious, or cruel.

4. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

In mitigation, the court found fifty-five facts that mitigated a death sentence, but it gave the sum of them only moderate weight (20 R 3899-3901). It also found that they failed to outweigh any of the aggravators (20 R 3903).

This appeal follows.

STATEMENT OF THE FACTS

I. The State's case against Andrew Busby

Andrew Busby was an inmate at Columbia Correctional Institution (76 R 871). He was also small (110 pounds), young,

looked younger (maybe 9 years old), white, and small (80 R 1302)[1]. He was, therefore, fair, desirable game for the population and especially the black population of the prison. Over the several months leading up to the murder of Eldon Ard, he was repeatedly, constantly harassed and attacked by other inmates who wanted to turn him into a "punk" or homosexual plaything (77 R 1004, 1028-29, 1033, 78 R 1071, 1086). He tried his "damnest" to get the other inmates to stop, but nothing worked (78 R 1051). When he complained to the prison staff, they gave him as much grief as the inmates, refusing to investigate his complaints and some, actually a lot of them, threatened him (78 R 1054, 1062, 1086-88). When he tried to get away from the harassment by requesting administrative confinement, "They just put him right back on the compound." (78 R 1067, 1088) Stuck, without any way out, he "thought long and hard" and came up with a plan (77 R 1004). He linked up with another inmate, Charles Globe, and the two of them made a list of inmates and staff from which they would choose to kill to send the prison--both administration and inmates -- a message that "This has to got to stop." (78 R 1033, 1050).

He had had sex with one inmate, a Roberto Rosa, who told him he was HIV positive, and Busby "wanted to kill him for that." (78 R 1051). Elton Ard, Busby's cellmate, was also on that list because he had pressured him since they had begun rooming together into becoming a "punk." (78 R 1028). He had also grabbed the defendant by throat a few times, to "put him down." (78 R 1034). Thus, by Friday, Busby and Globe had decided to kill Ard. They planned to do it on Saturday, but the plan failed to jell. They said they would do it the next day, but again things did not come together (78 R 1035).

After breakfast on Monday morning, Ard returned to his cell, and Busby followed. Within a short time, Globe also came in, closed and locked the cell door (78 R 1036, 79 R 1146). Ard wanted sex from Busby. "He told me he ain't never had no baby give him

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1 This information came from Charles Konetski, a defense witness.

a head job before." (78 R 1037). Globe put some paper over the cell door window, and as Ard approached Busby, Globe began to strangle him with a garrote he had made (78 R 1039). It broke, Busby kneed him, and Globe wrapped the garrote around the victim's neck again. The men fell down. Ard asked them to stop, offering them $45 (78 R 1040). Eventually the yelling and screaming stopped. Apparrently he was still alive, and then one of the men "got pissed" and "started hitting the shit out of him. And that's where all the blood came from." (78 R 1043). The garrotte was tightened more, and Ard died from the strangulation (77 R 963).

After, they posed the body, putting a cigarette in Ard's mouth (78 R 1044). Globe, using Ard's blood, wrote "Remember Andy and K.D." on the door, wrote "Andrew," and drew a "smiley" face (78 R 1046). Busby said he "poke[d] his eyes out," and "poked him in the ear," but there was no evidence of that (77 R 974-75, 82 R 1572). Globe said the two men then had sex (79 R 1165). After that, they waited for the guards (76 R 871-72).

II. Busby's defense

Busby agreed with the State regarding the harassment he had suffered in the days, weeks, and months before the murder of Ard. He also agreed that by July 3, 2000, Charles Globe, who also went by the name of Thomas Duke Kidd or K.D. (79 R 1136), had become more than friends. They had had sex (79 R 1179). On that day, he and Busby planned only to beat Ard, at least that is the impression Globe gave to the defendant (R 79 R 1147). Busby, however, had apparently had just had sex with Ard, and that enraged Globe (79 R 1152, 53). He snapped and strangled Ard over the defendant's protests (79 R 1155). He even tried to hit Globe and otherwise stop him, but to no avail (79 R 1155-58). In fact, had Busby been more diligent, Globe would have killed him as well (79 R 1196-97). After killing Ard, Globe ordered Busby to have sex with him (79 R 1165). The guard then found the men an hour later during count (79 R 1164).

Globe also reinforced the testimony presented as part of the State's case. Busby wanted to get away from Columbia Correctional Institution because he faced harassment and threats not only from the inmates, but the staff as well (79 R 1166-67). He had helped Busby file "quite a few" grievances with the prison officials, but the latter did nothing (79 R 1168).

Another defense witness, Charles Konetski confirmed the sexual harassment and threats directed at the "very young" Busby (80 R 1293, 1298, 1299).[2]

Over defense objection, the court excluded, as part of his case in the guilt part of the trial, evidence that his mother, fathers, sisters, and foster parents had so severely physically, verbally, emotionally, and sexually abused Busby as a child that he was diagnosed as suffering Post-Traumatic Stress Disorder, among other things (78 R). As a result, he never, as a child, felt safe, and the fear of further trauma only increased when he went to Columbia Correctional with its threats of rape (78 R 1106). Thus, events, which to a normal person might seem inconsequential, would, to this traumatized young man, trigger a fear of an imminent attack (78 R 1106).

III. Penalty Phase evidence

The State introduced evidence that in January 1998 Busby had killed a cab driver and his passenger, and as a result, was found guilty of two counts of first-degree murder and sentenced to two consecutive terms of life in prison without the possibility of parole (82 R 1601-1603).

Andrew Busby was born Michael Davis (83 R 1656, 1667). His mother was probably a prostitute (83 R 1735), and during his early childhood, he witnessed violence, including violent crimes.

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2 "At the time I knew Mr. Busby was about maybe 110 pounds, very thin, very young--very, very young. Maybe looked 9 years or so." (80 R 1301).

He saw sexual acts, specifically his stepfather sexually abusing his sister, and he made him watch pornographic movies. "He witnessed a lot of things that we probably still don't know" (83 R 1732). More than simply seeing it, his father, sister, and her boyfriend repeatedly sexually assaulted him before his fourth birthday (83 R 1735).

Eventually the State took Busby away from his mother. Well, at first they did not, and during his childhood he was repeatedly taken from his mother, returned to her care and inevitably taken from her again and again. Each of the innumerable times the State put him in a different foster home than the one he had been in before (83 R 1730).

Yet, life, even foster home placements were a disaster for this young boy (83 R 1736). One family wanted to adopt him, but the foster mother was herself abusive, threatening, belittling, and generally mimicking what his natural mother had done to him (83 R 1736). At least until he was 11 years old no one other than the State took care of him, and it systematically destroyed whatever childhood this young boy had (83 R 174 1-42, 1750).

The boy who would become Andrew Busby predictably developed severe emotional and psychological problems. He would get angry, throw things in class, and unsurprisingly, act out sexually, even "propositioning" a doctor when he was four or six years old (83 R 1737). He wished the foster mother who had planned to adopt him and her unborn child were dead (83 R 1771). Most ominously, he violently killed a puppy while still a small boy (83 R 1737-38) "Something [was] seriously wrong."

Helpless against the attacks from his mother, father, sister, and others, this young boy's normal development was disrupted, and in his case "it was very serious because he didn't have a clear victim/offender identity." (83 R 1739). As a result he never overcame the sexual abuse, and he saw his perverse world of sex acts, violence, terror, and abuse as normal. Very significantly, he never felt safe (83 R 1765). He was heavily traumatized, and

eventually this child was sent to a hospital for his extreme psychiatric problems (83 R 1744). This insecurity so pervaded his life that even when experts tried to help him, they could not (83 R 1765).

When he was six years old, he tried to kill himself (83 R 1745).

When Michael Davis was 11 years old, the State asked Reverend Walter Busby if he could take care of the boy for the weekend. He agreed, and eventually he adopted him. The baggage of his abuse, however, came with him, and he continued to have problems in school and at home. (83 R 1764). "He would get afraid and angry," and "he was very afraid he would be, as he used to put it, dumped." (83 R 1764, 1766). Reverend Busby, however, told his new son, "the only way you're getting out of this house before you're 18 is if I'm lying across the doorsill dead." (83 R 1664-65). In time, the better side sometimes surfaced. He became a good worker, a loyal friend, and a devoted cousin (83 R 1675). Indeed, even in school Andy wanted to do well, and he "would start out with a bang." Eventually, however, his behaviors "would lead to going down," and by the 11th grade he had dropped out (83 R 1676, 1698).

Thus, when Busby was sent to Columbia Correctional Institution, the persistent sexual attacks and harassment inflicted on him aggravated the raw spot the years of abuse and terror this extremely emotionally disturbed and immature defendant had endured (83 R 1679, 1680-84).

SUMMARY OF ARGUMENT

ISSUE I. The court refused to grant Busby's cause challenge on Kim Lapan, a former guard of death row inmates at Florida State Prison. His acknowledged biases against them and admitted willingness to execute persons who had committed premeditated murders raised reasonable doubts of his impartiality

not only for the guilt phase portion of the trial, but the penalty phase as well.

ISSUE II. The trial court refused to let Busby present the expert testimony of social worker Martha Jopson. She had treated him for almost 8 years as a result of the extensive child sexual, physical, and emotional abuse he had suffered. She diagnosed him as suffering from Post-traumatic Stress Disorder (PTSD). Her testimony would have helped the jury understand his self-defense argument, particularly why the prison environment, with its inherent and pervasive violence, would have created within this defendant a justified fear that he faced imminent violence. Specifically, he would be raped, not once, but repeatedly and without any concern or intervention by the prison administration. For him, the danger of such an attack was real, and Jopson's testimony would have helped the jury understand why his subjective fears increased once inside Columbia Correctional Institution.

ISSUE III. As part of Busby's defense, the defendant called the codefendant, Charles Globe to testify. During his testimony, Lisa Long, a state attorney investigator saw the defendant make some hand gestures. The prosecutor brought the matter to the court's attention, and during the ensuing hearing, Busby testified that he had signed the word "liar" to Globe, who when he was asked, said he had never seen Busby's movements. The prosecutor, when he cross-examined the defendant, got him to say that by liar he meant that Globe was lying when he said Busby knew nothing about the murder and only watched him lull Ard. The court ruled the jury could not only hear Long's testimony, it could also hear Busby's testimony, especially that explaining what the defendant meant by signing "liar." That was error because what the defendant says at hearings, whether constitutional issues are involved or not, cannot be used as substantive evidence at trial. Indeed, before the defendant testified, the court reassured him the jury would never hear what he said at the hearing. It obviously reneged on that promise, but it erred in doing so.

ISSUE IV. As mentioned in the previous issue, Busby called Globe to testify in his behalf. Actually, Busby's lawyer wanted him to take the stand. The defendant adamantly did not want him to. To resolve this "impasse" between counsel and his client, the State suggested that Globe's testimony be videotaped. Busby's lawyer vigorously objected. He wanted the jury to be in the codefendant's physical presence to appreciate his domineering physicality. The court refused that request, and the jury saw only Globe's videotaped testimony. That was error because the Sixth Amendment guarantees an accused the right to literally, physically present his evidence to the jury. The virtual reality of the late twentieth century electronic age has, to a large degree, found little acceptance in the courtroom. Having the jury see Globe through a TV set had no substantial justification and served no useful purpose. The State had no standing or right to meddle in the disagreement between Busby and his lawyer, and its "good idea" served his interests more than those of the defendant.

ISSUE V. Prison investigators talked with Busby four times: twice on July 3, once on July 7, and once on July 12, 2000. At the first July 31~ questioning, after being informed of his Miranda rights, he told them he did not want to talk. Inspector Schenck stopped his questioning, but Agent Ugliano from the Florida Department of Law Enforcement did not, although the defendant said nothing particularly incriminating. Later that evening, the inspectors again warned him of his rights, the defendant acknowledged them, but never explicitly waived them. Shortly, he and Globe confessed to killing Ard. Applying the several factors identified by the United States Supreme Court in Michigan v. Mosely, 423 U.S. 96 (1975), to the facts of this case reveals that the police failed to scrupulously honor the defendant's right to cut off questioning guaranteed by the Fifth Amendment and the Miranda rights.

ISSUE VI. As part of the State's case, the prosecutor introduced evidence that Busby wanted to kill two other inmates. Ostensibly this evidence showed his premeditated intent, tended to

rebut a defense of minor or no participation, and it exhibited a similar modus operandi with the murder of Ard. Whatever tendency this evidence may have had, its prejudicial impact substantially outweighed its relevance. The State simply had no need for this proof, and had relevance only to show the defendant's bad character.

ISSUE VII. As mentioned, the police interviewed or questioned Busby on several dates. At the guilt phase, the State played the audio tape of the July 3 confession. As it did this, the jury read along with a transcript of the statement. During the penalty phase of the trial, the prosecution had the jury read a transcript of the July 7 confession because by the time of the trial, it had lost the audiotape of it. The court should have refused to let the prosecutor do that. Jack Schenck, the investigator who had questioned Busby on July 7, listened to the tape shortly after the interrogation, but he had never made a detailed comparison of the accuracy of the transcript with the tape. As such, the State never carried its burden of showing that the transcript was a "duplicate" of the tape. Without being able to attest to its accuracy, the written record of the confession was inadmissible.

ISSUE VIII. The trial court found Busby committed the murder of Elton Ard in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Busby, however, presented extensive evidence of the harassment, taunts, and threats by other inmates and the indifference of the prison staff to his repeated pleas for help. The murder of Elton Ard became his way of
defending himself from the reality of repeated, daily rapes. As such, he had at least a pretense of legal justification in killing the victim.

ISSUE IX. As part of his penalty phase defense, Busby sought to admit evidence detailing the trauma he had suffered at the hands of his mother, father, and others when he was a youth. The court excluded the letters and videotapes because they were hearsay and "self-serving." That was error because this evidence would

have supported his claim of extreme, extraordinary abuse as a child and young adult. Because this Court has recognized the lesser standards for admissibility of evidence applicable for penalty phase hearings, the trial judge should have admitted Busby's proffered exhibits.

ISSUE X. At some point, Busby wrote a lurid, sexually explicit letter to Globe. The court admitted it during the penalty phase hearing because in it he said that but for Globe's "love and support, I would be on trial for another murder." Whatever relevance that letter had was overwhelmed by its shockingly sexual content.

ISSUE XI. Although this Court has ruled that Ring v. Arizona, 536 U.S. 584 (2002), has no impact on the constitutionality of Florida's death penalty scheme, it does. That case will ultimately required unanimous jury recommendations of death. This Court should recognized that truth and reverse the trial court's sentence of death because the jury in this case voted death by a non-unanimous 11-1 vote.

ISSUE XII. This Court has also rejected the application of the United States Supreme Court's ruling in Old Chief v. United States, 519 U.S. 172 (1997). That case should have prevented the State from presenting the underlying facts of the defendant's other convictions which had an affect on his current legal status. This Court should recognize it has erred in so ruling, even though it has recently reaffirmed that position.

ISSUE XIII. Finally, this Court should grant Busby a new sentencing hearing because the jury instructions repeatedly told the penalty phase jury that its verdict was merely a recommendation, and at no point does it say that the trial court will give their decision great weight. Such minimizing of the jury's role violated the dictates of the United States Supreme Court's ruling in Caldwell v. Mississippi, 472 U.S. 320 (1985).

ARGUMENT

ISSUE I

THE COURT ERRED IN REFUSING TO GRANT BUSBY'S CAUSE CHALLENGES TO PROSPECTIVE JUROR KIM LAPAN, A FORMER GUARD OF DEATH ROW PRISONERS AND ONE WHO HAD A BIAS AGAINST THEM, WHICH FORCED HIM TO USE A PEREMPTORY CHALLENGE TO KEEP HIM OFF HIS JURY, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

During voir dire, Busby sought to excuse Mr. Kim Lapan because of his inability to render an impartial verdict, as required by the law of this State. Singleton v. State, 783 So.2d 970, 973 (Fla. 2001). The court refused to excuse him for that cause, and that, in turn, forced the defendant to use one of the 10 peremptory challenges given him to keep this prospective juror off his jury (73 R 601-602, 75 R 744). As a result, he later exhausted them, requested more, and specifically identified those members of the venire he would have used them on (75 R 744). The trial court, rather than granting any extra challenges, denied that request (75 R 745). Busby, thus, has clearly preserved this issue for review. Trotter v. State, 576 So.2d 69 1, 693 (Fla. 1990). Indeed, although this Court reviews these type of issues for an abuse of discretion, Pentecost v. State, 545 So.2d 861 (Fla. 1989),[3] the defendant's persistence in satisfying every demand this Court has required to preserve his objection to Lapan should prompt it to give much

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3 In Salgado v. State, 829 So. 2d 342, 344-45 (Fla. 3rd DCA 2002), the Third District recognized that issues of juror competence raised a question of mixed law and fact. Accordingly, this Court must give the trial court's evaluation of the facts the due deference implied by an abuse of discretion standard, but it is free to reach its conclusion about what those facts legally mean.

closer scrutiny of what the trial court did than it might do for other alleged trial errors.

When questioned, Mr. Lapan revealed that he was in favor of the death penalty, apparently because he had worked at the Florida State Prison for eight years. More specifically, he had worked on death row.

> Q. Mr. Lapan, would you say that you oppose or are you in favor--
>
> A: I am favor of it. I worked in Florida state prisons.
>
> Q: Did you work on death row?
>
> A: Yes.
>
> Q: What did you do there?
>
> A: I worked the keys. I have worked showering. Everything there is. I worked every post.
>
> Q: You no longer work there?
>
> A: No, sir.
>
> Q: Based upon your experience as a correctional officer, if I told you that you could end up learning this homicide occurred inside a prison, do you think that would affect your ability to sit as a juror?
>
> A: Possibly.
>
> Q: Would that be something that knowing the position that you held before, you might consider something an aggravating circumstance beyond

what the judge says, based on your personal experience?

A: Possibility.

* * *

Q: Knowing that, do you think based on your experiences as a correctional officer that worked on death row, that there might be things in your mind that are aggravating circumstances that you would consider outside those that the judge read you, particularly once you learn that this homicide was --

A: No. I don't think so. I think I can determine what the judge wants and go by what they feel are the parameters we are supposed to stay within.

Q: So what you are saying, even though you worked as a correctional officer for eight years --

A: Yes, sir.

Q: -- with part of that time spent on death row --

A: Yes, sir.

Q: -- that you don't think that any of your own personal experiences would come into play as far as maybe you think something is an aggravating circumstance that could possibly warrant a death sentence that was not included in the judge's instructions?

A: I would like to think I could be open-minded enough.

Q: ... What I am trying to find out is based on your own life experience, do you think there is something you feel so intensely about that could possibly cause you to vote for death -- not be outlined by the judge?

A: One thing I don't like is death row inmates that are sentenced to death sit 10 to 15 years, which I don't think is right.

Q: Do you believe that life in prison is severe enough for someone who is found guilty of premeditated murder?

A: No.

* * *

[BY MR. DEKLE] [the prosecutor]:

Now you had mentioned someone having been convicted prior of crimes. Might in your mind be something that would cause you to automatically vote for the death sentence?

A: Possibly.

* * *

Q: While you were at F.S.P., were you ever the victim of any assaults?

A: Yes.

Q: Do you think that is something in your own mind if you learn that this had taken place in a

correctional institution would factor in regardless of what the judge said as far as affecting your mind?

THE COURT: You can answer that if the going to affect your decision in this case.

THE PROSPECTIVE JUROR:

I don't know.

[BY MR. DOSS]: If the judge instructs you to set your personal feelings aside, would that be something you can or can't set aside?

A: I believe I can.

(72 R 382-389).

As mentioned, Busby moved to excuse Mr. Lapan for cause, but the prosecutor found him "imminently qualified," and the court denied the challenge (72 R 390). That was error.

The jury system of justice traces its roots back three quarters of a millennium to a time when those chosen to determine an accused's guilt or innocence had knowledge of the facts of the case. Stephen Landsman, "A Brief Surey of the Development of the Adversary System," 44 Ohio St. L. J., 713, 722 n. 17 (1983); Ellen S. Sward, "Values, Ideology, and the Evolution of the Adversary System," 64 Ind. L. J., 303, 322 n. 16 (1999). That approach worked, perhaps, in small communities where everyone knew everyone and everyone minded his neighbor's business. It collapsed, however, as society evolved and became larger and more complex, and it did so for obvious reasons. One juror may know the "facts" but others did not. Hence, his recollection, correct or not (because there was no way to measure its accuracy) would tend to become the "facts" on which the rest of the jury based its verdict. Confidence in the results, thus, ebbed. Hence, over the last two

hundred years, at least, the American justice system has moved toward the ideal that the jury should know nothing about the facts of the crime the State has charged the defendant with committing. Landsman, cited above, at 713. The court, utilizing the rules of evidence, "filters" the evidence every juror hears so that when they deliberate, they all have the same facts on which to reach a just verdict. Thus, jurors who are relatives of the defendant or the victim, are routinely excused from serving on the jury, as are others who might have first hand knowledge of the facts of a case.

Yet, this "sanitizing" goes beyond excluding those prospective jurors who might know the facts of a case. It extends to those who might have some bias or prejudice for or against the victim or the defendant. Mothers against Drunk Driving would naturally have a difficult time passing on the guilt or innocence of a person charged with driving while intoxicated. Our system of justice has moved so far from the early forms that it now rests on the unchallenged prerequisite of juror impartiality. Carratelli v. State, 27 Fla. L. Weekly D2510 (Fla. 4th DCA November 20, 2002). Hence, a court should excuse a prospective juror if "there is any reasonable doubt about the juror's ability to rend an impartial verdict." Singleton, cited above. (Emphasis added.) A court should excuse a member of the venire if there is doubt about his or her impartiality. In this case, there is no evidence Lapan had any knowledge of the facts of this case. The problem arises from the biases he had developed during the eight years he had worked for the Department of Corrections generally and on death row in particular. Of course, just being a guard at FSP, by itself, would provide some, but not enough, reason to have found him incapable of sitting as a juror. State v. Williams, 465 So.2d 1229, 1230- 1231 (Fla. 1985).[4] Lapan, however, had more problems than simply having worn the brown DOC uniform. First, he had no love lost for the inmates he had supervised. Indeed, he was in favor of the death

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4 Thus, the court would have been correct in denying a cause challenge to a prospective juror whose wife worked at the prison where the murder occurred (73 R 461).

penalty because he had worked on death row at Florida State prison. (72 R 382). Rather than saying that experience would have had no impact on his impartiality, he said it possibly could affect his ability to sit as a juror (72 R 383). More disturbing, that exposure to death row inmates might become an unenumerated aggravating circumstance (73 R 383). Indeed, his years as a guard at FSP and on death row had so hardened his attitudes that he believed that death was the only punishment a defendant should receive who had premeditated a murder (72 R 385-86).

Busby acknowledges that Lapan said that he could "go by what they feel are the parameters we are supposed to stay within," and he "would be open minded enough." (72 R 384, 385) Yet, his presumed assurances of impartiality lack the firmness required, especially in light of the obvious bias revealed by his other answers. See Kerestesy v. State, 760 So. 2d 989, 991-92 (Fla. 2d DCA 2000) (prospective juror who "guessed" she could be fair and follow the law after a previous hesitant response regarding whether or not she could be impartial should have been excused for cause); see also Brown v. State, 728 So. 2d 758, 759 (Fla. 3rd DCA 1999) (Trial court erred in refusing to excuse for cause a prospective juror who responded, "Yeah, I think so" when asked whether he would be able to follow the trial court's instructions). They do not overcome the distinct impression that this former guard, who had himself been assaulted by inmates, (72 R 389) raised a reasonable doubt about his impartiality in this type of case. Williams v. State, 638 So. 2d 976, 978 (Fla. 4th DCA 1994)(A juror's response that I'll be impartial because that's my character' was insufficient to erase the doubt created by his other comments.) This is particularly true here because the jury would hear testimony that the guards refused to help Busby when he complained to them of the sexual advances other inmates had made on him (77 R 1004, 1028-29, 1033, 78 R 107 1, 1086). Not simply an indifference to his plight but a thinly veiled contempt for him (78 R 1054, 1062, 1086-88). More troubling, other testimony showed that Busby and Globe included guards in the list of those whom they considered killing. For a former guard, who had been assaulted, and who had little love for

those whom he had guarded, such evidence could only have triggered the biases he had.[5] Fortunately the law says Busby should not have had to overcome that tilt to get a level playing field. Hill v. State, 477 So. 2d 553, 556 (Fla. 1985); Price v. State, 538 So. 2d 486,489 (Fla. 3d DCA 1989)("A juror is not impartial when one side must overcome a preconceived opinion in order to prevail.")

Lapan's answers to voir dire raised a reasonable doubt of his impartiality not only in the guilt phase of the trial, but critically in the penalty phase trial. It would be shear folly to believe the experiences and biases developed during his eight years as a guard at Florida's most dangerous prison guarding the world's most dangerous men would have magically remained outside the jury deliberation room. It is far more reasonable to believe that the other jurors, for whom death row and capital sentencing was a strange, foreign experience, would have naturally looked to and relied on the one person who had sustained experience dealing with death row inmates. Yet, the history of our system of justice has moved far beyond the medieval dependance on personal knowledge and bias of jurors. Juror impartiality, as much as a judge's evenhandedness, forms the bedrock foundation on which we have built the modem approach to justice. The trial court, therefore, erred in refusing to grant Busby's cause challenge on Lapan and forcing him to use a peremptory to make sure this obviously biased member of the venire would never serve on the defendant's jury.

ISSUE II

THE COURT ERRED IN EXCLUDING THE TESTIMONY OF MARTHA JOBSON, A SOCIAL WORKER, WHO WOULD HAVE TESTIFIED THAT BUSBY SUFFERED FROM POST-TRAUMATIC STRESS DISORDER, WHERE SUCH EVIDENCE WOULD HAVE SUPPORTED

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5 Lapan also had friends who were involved in the murder of death row inmate Frank Valdez by prison guards (73 R 601).

AND JUSTIFIED A DEFENSE OF SELF-DEFENSE, A VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Before trial Busby sought a court ruling that he could raise a defense of self-defense. Specifically he wanted to present the testimony of Martha "Nan" Jobson and Charles Konetski. Ms. Jopson, a social worker who had seen Busby as a child and teenager, had diagnosed him as suffering from Post-traumatic Stress Disorder (78 R 1104). Mr. Konetski was an inmate at Columbia Correctional Institution, and he had witnessed several inmates harass, threaten, and taunt the defendant in the days and weeks before he and Globe killed Elton Ard (80 R 1298-99). After some preliminary skirmishing (see volume 72 of the record),[6] the State objected to the defense testimony only on the grounds of relevancy (72 R 255), and the requirement to lay a predicate for its admissibility (77 R 910). Specifically, it claimed Busby's witnesses could not show he had killed Ard because of the latter's "offer of imminent violence." (77 R 920) The court postponed ruling on the admissibility of her testimony on that basis until the State had rested its case in chief.

At that point, the defendant proffered what Jobson would say. As a licensed social worker with 15 year experience treating those who had suffered sexual abuse, she had treated the defendant from 1988 to 1996 (78 R 1 102). Before he turned 11 years old, his natural father, mother, and sister, and foster parents had physically, sexually, and verbally abused him (78 R 1108). She diagnosed him as suffering a conduct disorder, depression, and most significant,

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6 The State originally objected to self-defense claim because no notice of it had been given (72 R 206). The court granted that objection and completely excluded any self-defense claim (72 R 237-38). It also refused to grant a defense requested continuance (72 R 245) to give the State an opportunity to prepare for that defense (72 R 249). The State later retracted its original objection, but maintained that the testimony Ms. Jobson would offer was still irrelevant should be excluded for that reason (72 R 255).

Post-Traumatic Stress Disorder (PTSD) (78 R 1 104).[7] He was reactionary, and he had a history of getting angry and acting out, and on occasion his perceptions of reality blurred (78 R 1104, 1108).

Consequently, he never felt safe for most of his life (78 R 1105). "He wasn't safe from his early childhood throughout his different foster care placements; and really for the first time in his life he found safety in the home of Reverend Busby." (78 R 1105). This meant that "constant sexual harassment" and threats of rape "triggered" the childhood fears for his safety (78 R 1106). Most significantly, "If somebody was triggered in that manner, [they would] interpret that possibly as an imminent threat." (78 R 1106) That person, the one who suffered the PTSD, the one who had never been safe as a child, the one who had suffered severe sexual abuse as a child would believe he was in danger (78 R 1 106). Said in legal terms, "that trigger would result in a subjective fear of imminent great bodily harm." (78 R 1108).

The court, after hearing Jopson's testimony, refused to let Busby call her as a witness. "[T]he defendant being present with a person larger than the two other persons and the two persons present, . . . having no trouble overpowering the third, the court finds the trigger testimony is not sufficient to outweigh the facts before the court, and the court will deny the post traumatic stress disorder self-defense issue as presented to this point." (78 R 1113).

As part of his defense Busby called Charles Konetski, an inmate at Columbia Correctional. He knew the defendant and described him as "about maybe 110 pounds, very thin, very young--very very young. Maybe looked 9 years old or so." (80 R 1302) The defense witness was particularly aware of the continuous harassment Busby had received from other inmates (80 R 1299).

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7 Additionally, he had nightmares, acted out, and would react with outbursts (78 R 86).

Konetski told guards and staff about it, but they did nothing (80 R 1299-1300).

Busby renewed his request to present his self-defense claim after he had rested his case, but the court again denied it (81 R 1415, 1420). Under an abuse of discretion standard, this Court must conclude the lower court erred in making those rulings because Jopson's testimony would have explained why the threats of rape had such a tragic effect on Busby. Not only did it rule incorrectly, its mistake effectively gutted his defense, and as such the error became so prejudicial that this Court must reverse his judgment and sentence and remand for a new trial so can present his self-defense claim.

I. The law on self-defense.

Section 776.12, Florida Statues (2002), allows a defendant to raise a claim of self-defense, even when he or she uses deadly force:

> A person is justified in the use of force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against such other's imminent use of unlawful force. However, the person is justified in the use of deadly force only if he or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.

Two parts of that definition bear examination: 1. The defendant must reasonably believe force is necessary, 2. To prevent the imminent commission of a forcible felony.

As to the defendant's reasonable belief, it is the defendant's subjective perception of his situation that is critical. There is no objective, reasonable person standard that must be met. Chameski v. State, 619 So. 2d 486 (Fla. 5th DCA 1993); State v. Mizwell, 773 So. 2d 618 (Fla. 1st DCA 2000). Thus, when Busby raised self-defense as an issue, how he perceived his world at Columbia Correctional Institution, his state of mind, See, State v. Hickson, 630 So. 2d 172 (Fla. 1994), became a critical part of his defense. This perception, which even an objective reasonable man would agree, had a large degree of truth, consequently led him to believe that the prison setting itself was always imminently dangerous, and he always faced the possibility of rape and assault. So, the problem Busby had to face at trial was establishing a basis or reason he believed he needed to kill Elton Ard. To do that, he had to present evidence of what PTSD meant and how it affected his perceptions, and to show that what he faced at Columbia Correction subjectively and perhaps reasonably triggered his fears for his safety.

II. Post-traumatic Stress Disorder as a defense.

Although Post-traumatic Stress Disorder (PTSD) has historical roots, until 1980 it had no formal, professional recognition. Disabled veterans returning from the Vietnam war forced the mental health profession to seriously consider the long term psychological damage soldiers suffered when exposed to the terrors of combat. Since then others besides them have been recognized as suffering severe mental disintegration because of their exposure to sudden, violence with the promise of death. Today, Post-traumatic Stress Disorder is a recognized psychological disorder arising when a person is personally exposed to or witnesses an extreme traumatic event that involves death or serious injury. The person's response to the event involves intense fear, helplessness, or horror. Diagnostic and Statistical Manual IV (Text Revision) (DSM IV-TR) American Psychiatric Association, section 309.8 1. While adults can suffer this disorder, as the Vietnam war clearly showed, sexually abused children are, understandably, particularly susceptible to a diagnosis of PTSD. That is, by virtue of

their immaturity and undeveloped personalities, the abuse inflicted on them creates greater stress, terror, horror, and hopelessness. They perceive a greater threat of danger from those who should protect them.[8] When the child has grown, he or she may be unable to accurately assess danger, and "men with histories of childhood abuse are more likely to take out their aggressions on others. . ."[9]

Child victims of abuse, thus, present a more complex problem than the soldier exposed to combat, or the person who witnessed a car wreck.

> In survivors of prolonged, repeated trauma, the symptom picture is often far more complex. Survivors of prolonged abuse develop characteristic personality changes, including deformations of relatedness and identity; in addition, they are particularly vulnerable to repeated harm, both self-inflicted and at the hands of others.[10]
>
> While it is clear that ordinary, healthy people may become entrapped in prolonged abusive situations, it is equally clear that after their escape they are no longer ordinary or healthy. Chronic abuse causes serious psychological harm.[11]

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8 National Center for Post-Traumatic Stress Disorder. Http://www.ncptsd.org/facts/general.

9 Judith Herman, Trauma and Recovery: The aftermath of violence-from domestic abuse to political terror. Basic Books (1997), p. 113; see, also, Jennifer E. Lansford, et.al. "A 12-year Prospective Study of the Long-term Effects of Early Child Physical Maltreatment on Psychological, Behavioral, and Academic Problems in Adolescence," 156 Archives of Pediatric Adolescent Medicine, 824 (August, 2002).

10 Id, at 119.

11 Herman, Trauma and Recovery, cited above, at p. 116.

> The first task of recovery is to establish the survivor's safety. This task take precedence over all others, for no other therapeutic work can possibly succeed if safety has not be adequately secured.[12] The process of establishing safety may be hampered or stymied altogether, however, if the survivor encounters a hostile or unprotective environment.[13]

Persons with PTSD typically exhibit a hypervigilance, or a heightened sensitivity to the nuances in the abuser and their surroundings. They may also become irritable and prone to outbursts of anger. They tend to have recurrent and intrusive distressing recollections of the events. They may act or feel as if the traumatic event is recurring, and that may include hallucinations and flashbacks. They have intense distress when exposed to the cues that symbolize or resemble the traumatic event. DSM IV-TR, p. 468.

If the mental health field has only officially recognized PTSD within the last quarter century, the courts, and particularly those in Florida, have moved with unusual speed in finding evidence of the disorder, or its variants, relevant. Hawthorne v. State, 408 So. 2d 80, 806-807 (Fla. 1st DCA 1982). This Court has recognized that Battered Spouse Syndrome, a subspecies of PTSD, is also relevant to a claim of self-defense. State v. Hickson, 630 So. 2d 172, 175 (Fla. 1993); Masterson v. State, 516 So. 2d 256 (Fla. 1987). It has allowed expert testimony on these newly named disorders "precisely because a jury would not understand why appellant would remain in the environment. . ." Hickson at 174.

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12 Id. at 159.

13 Id. at 165.

Directly on point, the First District Court of Appeal, in State v. Mizell, 773 So. 2d 618, 621 (Fla. 1st DCA 2000), recognized "that PTSD evidence is relevant on the question of self-defense."[14]

> We view the PTSD evidence offered in this case as state-of-mind evidence, quite analogous to battered spouse syndrome (BSS) testimony that has in fact been approved many times. BSS testimony has been admitted to support a claim of self-defense. See State v. Hickson, 630 So. 2d 172, 173 (Fla. 1993). . . . The cases that admit evidence of BSS do so to help the jury understand why the victim would subjectively fear increased aggression against hear. See Hawthorne v. State, 408 So. 2d 80 1, 806-807 (Fla. 1st DCA 1982).

Id. 620-21.

Thus, just as evidence of battered spouse syndrome is relevant "to show that because she suffered from the syndrome, it was reasonable for her to have remained in the home and, at the pertinent time, to have believed that her life and the lives of her children were in imminent danger, evidence that Busby suffered from PTSD was relevant to explain why he believed he was in imminent danger of being raped, tortured, or killed. "It is precisely because a jury would not understand why appellant would [strike out] that the expert testimony would have aided them in evaluating the case." Hawthorne, at 807.

III. What Busby feared: The imminence of rape and death in prison.

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14 Busby emphasizes that he wanted the PTSD evidence to support his defense of self-defense. He did not want it to show he had some reduced intent or diminished capacity to premeditate a murder. With some notable exceptions, evidence to do that is inadmissible. Chestnut v. State, 538 So. 2d 820 (Fla. 1989); Dillbeck v. State, 643 So. 2d 1027 (Fla 1994).

"Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offense against society,'" prison officials have a duty to protect inmates from violence at the hand of other inmates, Farmer v. Brennan, 511 U.S. 825, 833-34 (1994)(quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). Yet, undeniably it happens. And that should be expected because we have after all collected the most dangerous people in the world and concentrated them behind three layers of fencing and concertina wire. Why should we expect the bullying, the muggings, and the rapes to stop? Indeed, with a literally captive audience, most of whom have little to do, predators freely roam the prison halls and cells.

Even the United States Supreme Court has recognized the brutal violence endemic to prisons:

> Prisons are necessarily dangerous places; they house society's most antisocial and violent people in close proximity with one another. Regrettably, "[s]ome level of brutality and sexual aggression among [prisoners] is inevitable no matter what the guards do . . . unless all prisoners are locked in their cells 24 hours a day and sedated." McGill v. Duckworth, 944 F. 2d 344,348 (CA7 1991).

Farmer v. Brennan, 511 U.S. 825, 858 (1994)(Thomas, concurring.)

> The atrocities and inhuman conditions of prison life in America are almost unbelievable; surely they are nothing less than shocking . . .
>
> A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail.

United States v. Bailey, 444 U.S. 394, 421 (1980)(Blackmun, dissenting.)

Lower federal courts have echoed that conclusion, noting, for example, that insufficient staffing led to "frequent violence and homosexual assault among the inmates," Alberti v. Klevenhagen, 790 F. 2d 1220, 1222 (5th Cir.) clarified, 799 F. 2d 992 (5th Cir. 1986); reports of many sexual assaults, Hassine v. Jeffes, 846 F.2d 169, 172 (3d Cir. 1988); "the risk of sexual assault was a serious problem of substantial dimensions," Jones v. Diamond, 636 F. 2d 1364, 1372 (5th Cir. 1981)); Withers v. Levine, 6 15 F. 2d 158, 161 (4th Cir. 1980); "an ugly picture of constant physical attacks and sexual assaults by other inmates," exists, Little v. Walker, 552 F. 2d 193, 194 (7th Cir. 1977); and "[p]risoners are frequently attacked and raped," Holt v. Sarver, 442 F. 2d 304, 308 (8th Cir. 1971);.McGill v. Duckworth, 944 F. 2d 344, 348 (7th Cir. 1991); Redman v. County of San Diego, 942 F. 2d 1435 (9th Cir. 199 1) (en banc).

Academics have supported those judicial findings of epidemic and pervasive prison violence. David M. Siegal, "Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framwork of Wilson v. Seiter", 44 Stan.L.Rev. 1541,1544 (1992)(Homosexual rape within male prisons occurs with frightening frequency and brutality.); Majore Rifkin, "Farmer v. Brennan: Spotlight on an Obvious Risk of Rape in a hidden World," 26 Colum. Hum. Rts. L.Rev. 273 (1995)("[B]rutal assault and homosexual rape are facts of daily life in men's prisons. . . Correctional administrators have long recognized that prisoners likely to be victimized are overwhelmingly young first offenders of slight build with passive, soft-spoken personalities."); Jeff Potts, "American Penal Institutions and Two Alternative Proposals for Punishment," 34 S.Tex. L.Rev. 443, 470-72 (1993).

This Court has also faced the reality of brutal, sudden inmate on inmate violence in this State's prisons. See, e.g., Christian v. State, 550 So. 2d 450 (Fla. 1989)(Inmate brutally kills another

inmate who had days earlier smashed him in the head with a barbell.); Cox v. State, 819 So. 2d 705 (Fla. 2002)(murder of inmate whom Cox believed had stolen $500 of his.); Kilgore v. State, 688 So. 2d 895 (Fla. 1996)(stabbing of homosexual lover); Demps v. State, 395 So. 2d 501 (Fla. 1981)(three inmates charged in the stabbing murder of another inmate.); Lusk v. State, 446 So. 2d 1038 (Fla. 1984)(Victim and two other inmates had robbed Lusk in his cell on the morning of the murder, stabbed his mattress several times and threatened him if he reported the incident. Lusk said he would not take it anymore and resolved to kill one of the men.)

Finally, Globe's and Busby's confession revealed the pervasiveness and reality of violent rape by the predators at Columbia Correctional that was directed specifically at him. For six months "Approximately - 43 people on this compound, other inmates, have been going around saying [Busby] is a punk [homosexual]. . . .That shit got old. . . . Stepped to the officers, let it die, stop it, quit it, and all he got was more harassment. He had officers telling him, oh, it's true, ain't it, it's true, ain't it. . . .Ard - passing the rumor, trying to keep the shit started and trying to pressure that dude into being a punk.. . (78 R 1028-29) Others had grabbed him by the throat several times (78 R 1034). "The purpose was to send a message. This has got to stop. . . I'm a young white boy.. . This camp right here is basically turning a white boy into a punk so he can be with a black dude." (78 R 1050) Indeed, the night before the murder, Busby heard Ard "tell someone that he was going to make me submit to him." (77 R 1004)

Of course, the prison staff theoretically controls or prevents the violence, but in this case, they not only failed to do so, they deliberately ignored it. With only one guard, and that probably a female (76 R 869), for every 225 inmates they simply could not control the population (76 R 878, 78 R 1079).

But we have more than simple overwork and insufficient staffing. The prison officials deliberately refused to help Busby. He complained about the threats, but after 18 months they had done

nothing about them, as prison investigator Schenk candidly admitted at trial (78 R 1086-87). When Busby tried to "check in," or be placed in administrative confinement to avoid being raped, that request was denied (78 R 1067, 1088). The guards even threatened Busby (78 R 1062, 79 R 1166)

In short, as Globe put it at trial, "[I]nside where I'm at the rules are totally different than out here. Inside prison it's a totally different situation, man. Out here you can call the police and they will come running to your house and everything is fine and dandy. Where I am at there ain't nothing like that. The only time the police want to come around is if you got something to snitch on." (79 R 1176)

So what could he do? Escape, even if possible, was legally unavailable. United States v. Bailey, 444 U.S. 394 (1980)(Defenses of duress and necessity unavailable if a legal alternative to escape exists.) Murder is an obvious extreme solution, and there is evidence Busby only wanted to beat Elton Ard (79 R 1147). But given the immenience of the rapes and beatings that pervaded and percolated through Columbia Correctional Institution and the prison official's acknowledged indifference to them, Busby had the right to defend himself. Or, in terms of this issue, the trial court should have allowed him to present his PTSD defense.[15] Whether, he had the right to lull Elton Ard was for the jury's determination..

Thus, refusing to let him present the testimony of Nan Jopson was error, and because it gutted any self-defense claim he had that this Court must reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE III

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15 Busby's argues only that he had the right to present his defense. The jury was the sole body to judge its credibility.

THE COURT ERRED IN ALLOWING STATE ATTORNEY INVESTIGATOR LISA LONG TO TESTIFY THAT SHE SAW BUSBY MAKE SOME HAND GESTURES DURING THE TESTIMONY OF CHARLES GLOBE, AND IT ALSO ERRED IN ALLOWING THE STATE TO READ, AS SUBSTANTIVE EVIDENCE OF GUILT, THE TESTIMONY OF ANDREW BUSBY WHEN HE TOOK THE STAND AFTER LONG ONLY TO EXPLAIN THE GESTURES, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

As part of his case, Busby called his co-defendant, Charles Globe. Actually, defense counsel called Mr. Globe because the defendant adamantly did not want him to testify (79 R 1 127). To apparently resolve this "problem" the State suggested (over defense objection(79 R 1129-30)) that the Court have Globe's testimony videotaped outside the jury's presence (79 R 1129). Judge Douglas agreed (79 R 113 1). The jury then viewed the recorded testimony of the codefendant (79 R 1228- 1282).

As Globe testified, Lisa Long, an investigator with the State Attorney's office noticed Busby making some gestures with his hands (79 R 1221). It looked to her as if he was telling the witness something in sign language (79 R 1221). She had no idea what it was (79 R 1221), and she could not recall at what point in his testimony he made the movements (79 R 1222).

Busby then took the stand and said that he had signed "liar" and nothing else (79 R 1223). On cross-examination, the prosecutor asked him if "you were telling him that he was a liar when he said that he acted alone." (79 R 1224). Busby said yes, and defense counsel objected to that question (79 R 1224). The court overruled the objection, noting "The jury is not going to hear it, but it goes in the record and you have the right to ask." (79 R 1224)

Actually, the jury did hear what Busby had said. After they heard Globe's videotaped testimony, the defendant called Charles Konetski, an inmate at Columbia Correctional Institution, and after he had testified, the defense rested its case (80 R 1305). The State then sought to call Lisa Long and to have Busby's testimony read as substantive evidence since he would not take the stand (80 R 1315-16). Busby vigorously protested, arguing

> The case law [is] legion as far as defendants taking the stand at motion [to] suppress statements or evidence hearings that that should not be used against them later on unless they actually take the stand and lie. . . .We are perfectly allowed to have him come forward and not run the risk that he is waiving any right to remain silent. That way we don't run afoul of his 5th Amendment rights."

(80 R 1316-17)

The State responded by arguing that the only time Busby could protect his right to remain silent "is when you are litigating Constitutional issues." (80 R 1318) It then cited two cases, Simmons v. United States, 390 U.S. 377 (1 968), and Hayes v. State, 581 So. 2d 121 (Fla. 1991), to support that position.

Overnight, Busby filed a written motion with the court arguing against admitting Ms. Long's and his testimony, and he also relied on Simmons and Hays. (17 R 3370-3381). The court denied the motion, citing the two cases (17 R 3382). This meant that Ms. Long testified, and Busby's testimony was read for the jury to hear (81 R 1389-94). The defendant then called Mr. Globe to testify, and he said he had seen no hand gestures by Busby (81 R 1411). Allowing Ms. Long to testify was error, but much more significantly, the court erred in allowing the State to produce Busby's testimony, and it abused its discretion in doing so, the applicable standard of review for this Court to use in measuring the harm of the court's error.

Put simply, the question presented here focuses on whether Busby's Fifth Amendment right against self-incrimination prevents the State from using, as substantive evidence, testimony Busby gave to resolve a question regarding the admissibility and relevance of Long's testimony. Simmons, Hays, and other cases from this Court and other courts have uniformly rejected the narrow approach advanced by the State, opting for a broader application of the Fifth Amendment.

In Simmons, the United States Supreme Court held

> that when a defendant testifies in support of a motion to suppress evidence on Fourth amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.

Id. at 394.

In Hayes, the defendant sought to prevent the State from using testimony he had given at a hearing on his motion to suppress statements he had given the police as substantive evidence at his trial for murder. The State tried to limit Simmons to protecting a defendant's standing to assert a Fourth Amendment challenge to a police search. This Court rejected that argument. "We reject the state's argument, instead agreeing with courts that have refused to read the principles of Simmons so narrowly." Id. at 126.

Indeed, this Court and courts of this and other states and the federal judiciary have applied the Simmons rationale beyond the "constitutional issues" limitation successfully argued by the prosecutor in this case. See, United States v. Hitchcock, 922 F. 2d 236, 239 (9th Cir 1993)(cannot use information in a financial disclosure form used to establish eligibility for appointed counsel as substantive evidence); United States v. Inmon, 568 F. 2d 326, 333 (3rd Cir 1977)(double jeopardy claim); Pedrero v. Wainwright, 590 F. 2d 1383, 1388, n3 (5th Cir. 1979)(Statement made by the

defendant at arraignment in support of insanity defense unavailable for use at trial.); State v. Spiegel, 710 So. 2d 13 (Fla. 3rd DCA 1998)(Testimony at a bar grievance proceeding cannot be used at trial.).

But, if the prosecutor correctly stated the law, the court should still have prevented the State from using Busby's testimony against him. That is, along with the Fifth Amendment rights, he has the Fourteenth Amendment due process right to present a defense, to object to and present evidence against the State's proof. Washington v. Texas, 388 U.S. 14 (1967).[16] It simply goes against the constitutional notions of fairness to allow the State to make its allegations but allow the defendant to meet them only if he gives up his Fifth Amendment right against self incrimination. Simmons, at 394. ("[We find it intolerable that one constitutional right should have to be surrendered in order to assert another.")

Moreover, the cited cases express the concerns the founding fathers had in adding an amendment to the constitution that protected accused citizens from having their testimony unwillingly used against them. This privilege or right against self-incrimination has such fundamental roots that courts look very close at claims that he or she has waived it. See, Smith v. United State, 337 U.S. 137 (1949) (Presumption against waiver of the privilege against self-incrimination, and courts will generally indulge every reasonable presumption against finding one.)

More applicable to this case, "waiver by testimony of the Fifth Amendment privilege is generally limited to the particular

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16 The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." Id.

proceeding in which the witness volunteered the testimony." State v. Spiegel, 710 So. 2d 13 (Fla. 3rd DCA 1998). In short, when a defendant takes the stand at a Fourth or Fifth Amendment proceeding, a hearing on a motion in limine, or a bar grievance proceeding, he knows that, except for impeachment uses, the State cannot use what he says there as substantive evidence at trial.

Of course, in Hays the defendant won the battle but lost the war because this Court found the lower court's mistake harmless beyond all reasonable doubts. Id. at 126. Such cannot be the case hear for the simple reason that the jury, during its deliberations, specifically asked the court for Busby's sign language testimony, as well as the statements he had made he made to the prison investigators in July 2000 (81 R 1518).[17] Obviously, what he said at trial had an impact on its deliberations and verdict. Or, said in the language of State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986): "[T]here is a reasonable possibility that the error affect the verdict." This Court cannot say the trial judge erred but only harmlessly. It should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IV

THE COURT ERRED IN REFUSING TO GIVE BUSBY HIS DUE PROCESS RIGHT TO PRESENT HIS DEFENSE IN THE WAY HE CHOSE WHEN IT REFUSED TO LET HIS CO-DEFENDANT, CHARLES GLOBE, TESTIFY BEFORE THE JURY LIVE AND IN PERSON, BUT INSISTED HE DO SO ONLY BY

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17 The prosecutor also referred to the signing incident during his closing argument. "And you can tell from his demeanor on the witness stand what a gigantic joke he thought this was. Laughing as he testified. Smirking as Busby (indicating) signaled to him: Oh, you little liar. The little joke between them. The joke that the protector here is going to lie Busby out of trouble on this murder charge, and nobody gets punished for the death of Elton Ard." (81 R 1497) Busby objected to that argument.

VIDEOTAPE, A VIOLATION OF BUSBY'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

Defense counsel planned to call Charles Globe, Busby's co-defendant, to testify as part of his defense. Busby, personally, objected to that. He did not want him to do so. "I still stand by my word. I don't want him testifying." (79 R 1127)

> THE COURT: If he testifies in your favor, it will be a good decision. You agree with that?
>
> MR. BUSBY: If he intends to take the whole blame. But I believe there's other things that he can say that is going to hurt me. I don't know what he would say, but I believe that.
>
> MR. DEKLE[the prosecutor]: Judge, I have an idea, and every once in a while I have a good one and I think this is a good one. Let's take Mr. Globe's testimony videotape. Ant at the end of his testimony give Mr. Busby an opportunity to voice whatever he voices . . . If he continues to object to it then the Defense can call the idea - -can then make a decision about whether or not to present his videotaped testimony.
>
> MR. DOSS [defense counsel]: Judge, I object to that. I want Mr. Globe here. I want the jury to see what kind of person that we are dealing with . . . I consider Mr. Globe an extremely intimidating man, that the jury will not get a full flavor of what is going on in that cell unless they are able to see him, hear him, look at him, have him look at them, and that they can understand what wen on there. . . .And a videotape is not going to be able to convey that . . .I don't think that Mr. Globe has acted out.

> MR. DEKLE; I think [videotaping] strikes a balance here between the defendant's wishes and trial counsel's wishes.

(79R 1129-1131).

The court then overruled defense counsel's objection, found merit in the State's "good idea," and had Globe's videotaped testimony presented to the jury (79 R 1228-1282). That was a bad idea, and the court's ruling an error.

This is an unusual issue. No one questions that Busby has a due process right to present a defense. Washington v. Texas, 388 U.S. 14 (1967). The question presented here asks to what extent can the trial court control or dictate how he presents that defense. Certainly, within the bounds of relevancy and other rules of law, Busby had the right to call Charles Globe as a witness to bolster or establish his self-defense claim. Could the court, though, agree with him to that point but then say he could do so only by presenting his testimony through a television set? Few cases from this Court have provided much guidance for this unusual issue.

Of course, extensive litigation erupted several years ago around the Sixth Amendment Confrontation Clause problem of the extent to which the law could limit the right of a defendant to actually, "face to face," confront his accusers, particularly when those accusers were children. Maryland v. Craig, 497 U.S. 836 (1990); Coy v. Iowa, 487 U.S. 10 12 (1988). While not on point to this issue, these cases shed some light on the very important significance the founding fathers gave to live, in person testimony. What they and the United States Supreme Court have said on the Sixth Amendment issue has relevance to this due process claim.

In Craig, the Supreme Court approved Maryland's procedure permitting allegedly sexually abused children to testify by one-way television. It did so with some significant restrictions. It held that generalized rules prohibiting any defendant from confronting a child

victim would fail to pass constitutional muster. Instead, in every case, the court had to make case-specific findings of necessity.

This Court has followed the path blazed by the United States Constitution when confronted with the peculiarly late twentieth century issue of allowing witnesses to testify by satellite links rather than appearing in person. "We are unwilling to develop a per se rule that would allow the vital fabric of physical presence in the trial process to be replace at any time by an image on a screen. Perhaps the 'virtual courtroom' will someday be the norm in the coming millennium; for now we do not conclude that virtual presence is the equivalent of physical presence for the purposes of the confrontation clause." Harrell v. State, 709 So. 2d 1364, 1368-69 (Fla. 1998). This Court gave no blanket approval of such techniques. "The State is urging this Court to conclude that the satellite procedure used in this case is the equivalent of physical, face-to-face confrontation. We decline to make such a finding." Id. at 1368. Instead, it allowed it only when the witness's testimony was "material and necessary," face to face testimony was a practical impossibility, and significant restrictions were followed. Id. at 1369-71. There is, thus, a legitimate queasiness in blindly accepting or even reasonably allowing the marvels of the electronic age into the courtroom. "However, in every criminal case, there is a strong presumption in favor of face-to-face testimony." Id. at 1370, f.n. 6.

> A courtroom is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of the trial, contributing a dignity essential to the "integrity of the trial process.

Estes v. Texas, 381 U.S. 532, 561 (1965).

> In a televised appearance, crucial aspects of a defendant's physical presence may be lost or misinterpreted, such as the participants' demeanor, facial expressions and vocal inflections, . . . and the solemnity of a court proceeding.

People v. Gutterndorf, 728 N.E. 2d 838, 840 (Ill. 3d DCA 2000)(Rejecting the television presence of the defendant at a plea hearing as equivalent to his physical presence .)

Trial courts, of course, have considerable discretion in how trials are conducted. Defendants have no blank check to do whatever they want and in whatever manner they choose. For example, in Stevens v. State, 419 So. 2d 1058, 1063 (Fla. 1982), the defendant claimed that he was so intoxicated when questioned by the police that what he told them was not voluntarily given. To prove or tend to prove his point, he offered to drink two cases of beer as a demonstration of his condition when he confessed. This Court agreed with the trial court that such a demonstration was unnecessary.

In Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999), the defendant wanted the jury to view the murder scene at 3 a.m, the time of night of the murder. The trial court refused, and this Court affirmed that ruling, although it reversed his conviction and sentence of death on other grounds. "Thomas's motion for a jury view was denied on the ground that it would serve no useful purpose because the scene could not be substantially duplicated."

If we adopt a "useful purpose" standard in measuring a trial court's limits on how a defendant presents his defense, there was no useful purpose in requiring Globe to testify by television instead of in person and "face to face." To the contrary, Busby's lawyer strongly emphasized the "useful purpose" of having this man physically appear before the jury. "I consider Mr. Globe an extremely intimidating man, that the jury will not get a full flavor of what is going on in that cell unless they are able to see him, hear

him, look at him, have him look at them, and that they can understand what went on there." (79 R 1130) Moreover, Globe had presented no problems when he had testified in his own trial, and his lawyer anticipated he would behave at Busby's trial (79 R 1125). Countering Busby's insistence on Globe's personal appearance, the prosecutor noted that if the codefendant testified, "he is very likely to mention murder convictions, possibly even make up murder convictions." So, what? Whether Globe lied or told the truth was for Busby to worry about, and it, in any event, had no relevance to how he would testify.

Of course, the prosecutor presented his "good idea" of videotaping Globe to get around the differences Busby had with his lawyer (79 R 1129). Yet, Busby had no problem with Globe testifying in person. He had a more basic difference with his counsel: he did not want the co-defendant testifying at all (79 R 1127). " I still stand by my word. I don't want him testifying." (79 R 1127). So, whether Globe spoke from the stand or through a televison tube made no difference, the defendant's and his counsel's differences remained.

Moreover, one must question the standing or right of the prosecutor to intrude into an attorney/client dispute. Trial strategy and deciding what witnesses to call or not to call is peculiarly a defense matter, and even more specifically it is a right that belongs to counsel, not the defendant. C.f., Jacobs v. State, 800 So. 2d 322, 323 (Fla. 3rd DCA 2001)(Absent extraordinary circumstances, failure of counsel to call a witness is not a ground for collateral attack.) Thus, the prosecutor had no say in how Busby's counsel wanted to present his case, and the trial court had only an exceedingly limited right to control how he presented Busby's defense.

As significant, since the State proposed the videotaping, & had the burden of showing its "substantial justification." Harrell, cited above at 1370, fn.6. It provided none. Likewise, the trial court provided no specific reasons why Globe, who was present, under

subpoena, and able to testify in person, had to present his evidence on videotape.

To significantly limit Busby's right to present his defense the way he wanted to for no significant reason was error, and intruding into this attorney client relationship served no useful purpose. To the contrary, it significantly limited the effectiveness of the defendant's defense by failing to give the jury the full impact of Globe's very intimidating physical presence. When compared to Busby's youth and very slight build, the self-defense claim would have become significantly stronger, particularly when Globe said he would have killed Busby if he had interfered with him while he was killing Ard (79 R 1196-97).

Because the State's case rested largely on the confession of Busby and Globe and the defendant's in court admission (See ISSUES IV, V, VII), refusing to allow Globe to testify in person was error. It became reversible error largely because we can have no honest assessment of its impact on the jury's verdict. That is, this court gives the trial court discretion in matters of this sort precisely because it is there, on the spot, and better able to measure the impact than this Court is, being miles from and months after the trial. Yet, if the trial court abuses its discretion, the very ephemeral nature of this issue must compel this Court to grant a new trial. The impact of Globe's physical presence in the courtroom instead of simply his virtual reality is hard to measure, but this Court cannot say with the easy confidence it has required when measuring the harmlessness of an error, State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986), that it had no effect on the jury's verdict. This is particularly true as evidenced by the jury's desire to closely re-examine the confessions Globe and Busby gave, along with the defendant's objected to in court admission (8 1 R 15 18). Obviously, they did not consider the evidence overwhelming. We must conclude they gave the defendant's self-defense defense serious consideration, ultimately, however, rejecting it. Had Globe testified before the jury in person, would they have inevitably reached the same conclusion? Hard to say, and because that is such a difficult

question to answer beyond a reasonable doubt, DiGuilio, at 1139 this Court must reverse the trial court's judgment and sentence and remand for a new trial.

The court's refusal to let the jury physically see Globe also had an impact in the penalty phase portion of the trial as well. Busby called his adopted father to the stand to testify, among other things, about the relation his son had with Globe. He testified that the defendant was a follower, or rather, "definitely a follower." (83 R 1690). The court would not, however, let him answer whether "Andy was under the substantial domination of KD. [i.e. Globe] on July 3rd 2000, based on your opportunities to observe their relationship." (83 R 1690)[18] That was error. Garron v. State, 528 So. 2d 353 (Fla. 1988); Rivers v. State, 458 So. 2d 762 (Fla. 1984); Hansen v. State, 585 So. 2d 1057, 1058 (Fla. 1" DCA 1991)(Lay witness can given opinion about a defendant's mental condition based on knowledge gained in a time reasonably proximate to the charged crime.) When that error is combined with the court's earlier mistake of allowing Globe to appear only by video then not only was their jury's guilt phase verdict affected, their death recommendation as well became suspect.

ISSUE V

THE COURT ERRED IN DENYING BUSBY'S MOTION TO SUPPRESS STATEMENTS HE MADE TO LAW ENFORCEMENT OFFICERS AFTER HE TOLD THEM HE DID NOT WANT TO TALK WITH THEM, A VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND HIS RIGHTS UNDER

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18 The court had, however, allowed Reverend Busby to answer whether his son's ability to appreciate to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. "Yes, I think he did. He was at his wits end." (83 R 1685-86).

ARTICLE I, SECTION IX OF THE FLORIDA CONSTITUTION.

About noon on July 3,2000, the day Ard was murdered, Jack Schenck, a senior inspector with the prison system's inspector general office and Don Ugliano, an agent with the Florida Department of Law Enforcement, questioned, or rather, tried to question Busby about Ard's death. The officials tape recorded their advising him of his rights (62 R 12315-16). When advised of his right to remain silent, "he elect[ed] not to speak" to them (62 R 12322). Agent Ugliano, however, continued to talk with Busby, but that part of the interrogation was not recorded (62 R 12325). Later that evening, about seven o'clock, the officers questioned the defendant again, this time with Globe present as well as some additional inspectors (62 R 12326-27). After reading the defendant his rights he talked with them (62 R 12322-23). But, as they admitted at the subsequent suppression hearing, "there was no indication in there that he waived his rights," although they said the defendant acknowledged he understood them "and began responding." (62 R 12332). The prison officials and FDLE agents also questioned him on July 7 and July 12, after they had read him his rights, and he apparently agreed to discuss the Ard murder with them (62 R 12323-24).

By way of a pretrial motion, Busby sought to suppress the statements he had made to the law enforcement officers on July 3, July 7, and July 12 because they had violated his Fifth and Fourteenth amendment rights against self-incrimination. Specifically, the police failed to "scrupulously honor" his request to remain silent. Miranda v. Arizona, 384 U.S. 436 (1966); Michigan v. Mosely, 423 U.S. 96 (1975); See, Traylor v. State, 596 So. 2d 957 (Fla. 1992). After hearing evidence and argument on the matter, the trial court denied the motion, finding that "the statements were made freely and voluntarily after full and complete advice as to the Defendant's rights." (13 R 2408)

At the guilt phase of the trial, the State introduced, over Busby's renewed objection (78 R 1023), the July 3 statement in which the defendant and Globe confessed to killing Ard. They also provided extensive detail of why they murdered him (78 R 1027-34). That evidence formed the foundation of the State's cases against Busby. During the penalty phase part of the trial, it also presented the jury with the transcript of the July 7 interrogation (82 R 1553-78).[19] That was error. This Court should review this issue by allowing the trial court its discretion to find facts supported by the record, but it can reach its own legal conclusions. Gibson v. State, 835 So. 2d 11 59 (Fla. 2nd DCA 2002)(The applicable standard of review requires us to defer to the trial court's factual findings that are supported by competent, substantial evidence, but we independently review the trial court's legal conclusions.)

Without question or arugment, the law enforcement officers followed the dictates of Miranda at each interrogation when they read him the rights as required by that case. The problem arose when Busby decided to cut off further questioning by invoking his Fifth Amendment right to remain silent. What could the police do or not do after that?

The law first required them to have "scrupulously honored his request to remain silent. Michigan v. Mosely, cited above. That is, they could not ignore, as Agent Ugliano did here (62 R 12339), his just invoked right to stop questioning and continue to ask him about Ard's death. Traylor, cited above at p. 966 ("[I]f the suspect indicates inany manner that he or she does not want to be interrogated, interrogation must . . . immediately stop.")

Now does this mean that they police could never talk to Busby about this or any other crime? No, but whether they had continued to scrupulously honor his original request to remain silent

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19 For some reason, the police had lost the tape, and the court allowed the prosecution to give the jury a transcript it assured the court was accurate (82 R 1592).

or had just worn him down into a fatalistic acquiescence depends on the facts under which the police reapproached him. In Michigan v. Mosley, the police arrested Mosely because they believed he had committed a robbery. When they tried to question him, he invoked his right to remain silent as they had just told him he could do. Two hours later, another officer sought to ask him about a murder he was investigating. After reading him his rights, Mosely waived his right to remain silent and eventually confessed to the murder. The United States Supreme Court found no constitutional problem with that confession.

> [T]he police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.

Id. at 106.

The Court identified several factors in reaching that conclusion.

> 1. The police advised Mosley of his rights before each questioning began.
>
> 2. They immediately stopped questioning the defendant when he said he did not want to talk about the robbery.
>
> 3. A significant amount of time elapsed between the interrogations.
>
> 4. The second session took place in a different locale than the first.
>
> 5. The second session focused on a different crime.

Id. at 104-105.

Here, the police went through the ritual of advising Busby of his rights at each interrogation. They did not, however, honor Busby's request to stop questioning him. Instead, at the first session, after Busby said he did not want to talk, Agent Ugliano said that he was from FDLE, and because someone had written on the cell wall to call it, he was there and what did he want (62 R 12340). Similarly, at the 7 p.m. session, although a visibly upset Busby (62 R 12341, 12353) acknowledged knowing what his rights were, he never said he wanted to waive them (62 R 12332), and in light of his invoking them earlier, the police should have done more than to accept his silence as anything other than an acquiescence to the inevitable. Bowen v. State, 404 So. 2d 145 (Fla 2nd DCA 1981)(Police failed to honor Bowen's request to remain silent and failed to get a subsequent waiver.)

The noon and 7 p.m. interrogations both took place at Columbia Correctional (62 R 12324, 12326). They also involved at least the same officers in each instance, although the evening questioning included others as well as Schenck and Ugliano (62 R 12324, 12327). The murder similarly was the focus of both sessions.

Thus, the Mosley factors show only that the police gave Busby his rights at both sessions. But that is all they did. Equally clear, when the defendant invoked his right to remain silent, the police understood what he had said as doing that. Henry v. State, 574 So. 2d 66 (Fla. 1991)(Defendant did not clearly invoke his right to remain silent.) Yet, Agent Ugliano wanted to keep him talking when he told Busby (after he had said he wanted to remain silent) that he was from FDLE and what did he want? This law enforcement officer tried to coax Busby to speak despite his acknowledged reluctance to do so. This inquiry, which may seem of little import to those not under the police lights, may very well have contributed to Busby's eventual capitulation to the repeated police inquiries about the murder. Breedlove v. State, 364 So. 2d 495 (Fla. 4Ih DCA 1978)(Relatively little pressure by the police needed to overcome a suspect's will to remain silent.) In terms of

Miranda, he never "scrupulously honored" this defendant's clearly invoked right to remain silent.

Careful scrutiny of the interrogating officers' actions, Jones v. State, 346 So.2d 639 (Fla. 2nd DCA 1977), show that the other Mosley factors weigh against finding the later confessions admissible, and exhibit the investigator's determination to question the defendant and eventually get his acquiescence by simply wearing him down. This is, as the Supreme Court said, a "case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, . . .by persisting in repeated efforts to wear down his resistance and make him change his mind." Id. at 105-106. Here, the police failed to "scrupulously honor" his request to remain silent.

This Court should reverse the trial court's order denying his motion to suppress, and remand for a new trial.

ISSUE VI

THE COURT ERRED IN ADMITTING, AS WILLIAMS[20] RULE EVIDENCE THAT BUSBY WANTED TO KILL A ROBERTO ROSA AND ALPHONSO PALMER, A VIOLATION OF THE DEFENDANT'S CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR TRIAL.

Before trial the State filed a "Williams Rule Notice" in which it claimed that at trial it would introduce evidence that Busby and Globe planned to "lure" two other prison inmates, Alphonso Palmer and Roberto Rosa, into his cell and kill them by strangling them with a garrotte (4 R 677, 11 R 2074). Busby filed a "Notice of Objection to Williams' Rule Testimony and Motion to Prohibit Williams Rule Testimony." (8 R 1413-16). At the hearing on the

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20 Williams v. State, 110 So. 2d 654 (Fla. 1959)(Similar fact evidence admissible even though it points to commission of another crime.)

notices and motion, the State gave a fuller explanation of the relevancy of that testimony. Specifically, in the July 3rd and 7th statements Busby and Globe said they had planned to kill "some inmate, any inmate," and that included Palmer and Rosa. When their plans collapsed, they settled on Ard (62 R 12397). "So, [the evidence of the other plans] goes to the issue of premeditation, and it also goes to the fact that it's almost inextricably bound up in the killing of Mr. Ard because Mr. Ard's death is a part of this general design to kill inmates." (62 R 12397) The evidence also tended to refute the anticipated defense that Busby had nothing to do with the murder. (62 R 12397-98). Finally, the evidence had relevance, the State argued, to show a similar modus operandi between the murder of Ard and the plans for Rosa and Palmer, namely the use of a garotte (62 R 12398).

Busby responded with several arguments, but the one relevant to this appeal contended that it was unnecessary and did nothing other than show his criminal propensity, which, of course, is irrelevant (62 R 12399, 63 R 12400)

The court denied the defendant's motion to exclude the Williams' Rule evidence (13 R 2404), and at trial and over Busby's renewed objections, the State introduced evidence of his attacks on and desires to kill Rosa and Palmer (78 R 1051). It also used this evidence during its closing argument (81 R 1427). Admitting that evidence and denying Busby's renewed objections were errors; under an abuse of discretion standard, this Court should reverse the trial court's judgment and sentence and remand for a new trial. Geldrich v. State, 763 So. 2d 1114 (Fla. 4th DCA 1999).

If the evidence of the plans against Rosa and Palmer has relevance to the State's case against Busby it does so only under Section 90.402, Florida Statutes (1997). Section 90.404(2)(a), Florida Statutes (1997), the codification of the so called Williams Rule, provides no basis for admissibility because the facts of the threats were so vague and devoid of details that they share no

similarities with those connected with the murder of Ard so as to show the defendant's motive or intent.

Thus, only Section 90.402 justifies, if it can be, the threat evidence. It simply provides that "All relevant evidence is admissible, except as provided by law." Significantly for this case, the "except as provided by law" includes Section 90.403, Florida Statutes (1997), which limits otherwise relevant evidence if "Its probative value is substantially outweighed by the danger of unfair prejudice, ..." Also, if the evidence only exhibits the defendant's bad character, it is inadmissible. Hence, because of the extraordinarily corrosive strength of the bad acts evidence, the vague threats against Rosa and Palmer, this Court should apply the "strict standard of relevancy" it has adopted in other cases. Heuring v. State, 513 So. 2d 122, 124 (Fla. 1987).

In this case, the State claimed the threats had relevance to show Busby's premeditation or consciousness of guilt, but if so, its pertinence to that issue was so weak that its damning, prejudicial value substantially outweighed the limited significance it may have had. Section 90.403, Florida Statutes (1997). Williamson v. State, 681 So. 2d 688, 696 (Fla. 1996)(Claim that prejudicial value of evidence outweighed its relevance rejected because it was "integral to the State's theory of why its key witness acted as he did both during and after the criminal episode.") In State v. McClain, 525 So. 2d 420 (Fla. 1988), this Court articulated the test to determine if the prejudicial significance of the offered evidence outweighs its probative value:

> In excluding certain relevant evidence, Section 90.403 recognizes Florida law. Certainly, most evidence that is admitted will be prejudicial to the party against whom it is offered. Section 90.403 does not bar this evidence; it is directed at evidence which inflames the jury or appeals improperly to the jury's emotions. Only when that unfair prejudice substantially outweighs the probative value of the

> evidence is the evidence excluded. ... . In weighing the probative value against the unfair prejudice, it is proper for the court to consider the need for the evidence; the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, e.g., an emotional basis; the chain of inference necessary to establish the material fact; and the effectiveness of a limiting instruction. 1 C. Ehrhardt, Florida Evidence § 403.1 at 100-03 (2d Ed. 1984) (footnotes omitted).

Here, the State simply had no need for this evidence, which had only a minimal relevance at best. David v. Brown, 774 So. 2d 775 (Fla. 4th DCA, 2000). Strangulations, by their very nature, and particularly in this case, must involve an evil intent or premeditation. Busby's designs were never an issue. This became obvious during the penalty phase of the trial when the State argued, and the court found, he had the "heightened premeditation" required for him to have committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (84 R 1807, 86 R 1900). The threats against Rosa and Palmer simply were unnecessary for any relevant purpose, and instead showed the defendant's bad character. See, Williams v. State, 539 So. 2d 563 (Fla. 4th DCA 1989)(Trial court should have excluded, as unduly prejudicial, portion of the defendant's confession in which he had said he had been arrested before and was on probation.)

Perhaps, though, the testimony of the uncharged crimes or bad acts -- i.e. the threats against Rosa and Palmer -- were admissible if they were inseparable from the charged crime and were necessary to adequately to describe it. Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994); Coolen v. State, 696 So. 2d 738, 742-43 (Fla. 1997). Obviously, what Busby said a week or month or two months before the murder could easily have been excluded without any reduction of the State's ability to tell its story. The threats simply did nothing to "explain[] or throw[] light upon the crime

being prosecuted." Tumulty v. State, 489 So. 2d 150, 153 (Fla. 4th DCA 1986). Rather, as the State clearly implied in its closing argument, Busby's plots and plans did nothing but reveal his propensity or bad character.

> Let's look at each part of this: Andrew Busby killed after consciously deciding to do so. What evidence do wehave of that? He wanted to kill Roberto Rosa. He wanted to kill Eddie, Alfonso Palmer, the guy I mentioned in opening statement. He wanted to kill Sergeant Smith. . . .He wanted to lull Sergeant Davis. He wanted to kill Sergeant Lindlow. Anybody. Somebody. Just let me have somebody to kill. He wanted to kill Ard.

(81 R 1427)

The threats could also have had relevancy if they put the "entire case in perspective." Bradley v. State, 787 So. 2d 732, 742 (Fla. 2001). In Bradley, the defendant and a couple of his employees tried to retrieve a diamond ring Jack Jones, the husband of Linda Jones, had given to his teenage girlfriend. Mrs. Jones had convinced Bradley to bully the girl and beat up Mr. Jones. A week after he had accosted the girl, Bradley beat and murdered the husband. The earlier incident against the teenager had relevance this Court held because it "provides the necessary coherence to the State's theory that Bradley had become the enforcer of Mrs. Jones' angry wishes, which ultimately included murdering her husband for his participation an extramarital affair."

In this case, the testimony of the threats -- i.e. the desire to kill Roberto and Palmer -- were admissible if they were inseparable from the charged crime and were necessary to adequately to describe it. Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994); Coolen v. State, 696 So. 2d 738, 742-43 (Fla. 1997). Obviously, those vague plans and intentions made some unspecified time before the murder could easily have been excluded without any reduction of

the State's ability to tell its story.[21] The threats simply did little to "explain[] or throw[] light upon the crime being prosecuted." Tumulty v. State, 489 So. 2d 150, 153 (Fla. 4th DCA 1986).

The threats against Rosa and Palmer only put Busby's bad character in perspective, or rather, it clearly presented this man's undifferentiated desire to kill. Such evidence, shocking as it was, was unnecessary to the State's case, so its obvious prejudicial value substantially outweighed its muted relevance. The court should have, therefore, excluded it, and that it abused its discretion in admitting this evidence means that this Court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VII

THE COURT ERRED IN ADMITTING A TRANSCRIPT OF BUSBY'S JULY 7,2000 CONFESSION RATHER THAN THE ORIGINAL AUDIOTAPE OF THAT STATEMENT, A VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL.

Busby gave three statements to the prison investigators: July 3, 2000, July 7, 2000, and July 12, 2000. During the guilt phase of his trial, the State introduced an audio tape of the July 3 confession, which the jury heard (78 R 1025). They also had a transcript of what he had said to use while the tape was played (78 R 1025).[22] During the penalty phase, the State wanted to introduce only an alleged transcript of the July 7, 2000 confession. By the time of trial, the police had lost the audio tape of what the defendant had said, and had only what it claimed was a transcript of it (82 R 1592). Jack Schenck, one of the prison officials who had questioned

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21 The plans on Rosa and Palmer were discussed as along as a week and maybe a month before the murder of Ard (63 R 12400).

22 See Exhibits 74-A and 75-A.

Busby on July 7, claimed the transcript "fairly and accurately depict[ed his] recollection of the conversations [he] had with Mr. Busby on July the 3rd (sic)?" (82 R 1552). He had not, however, transcribed the interrogation(82 R 1554), nor had he listened to the tape for at least 21 months (82 R 1553). That is, about a year after the murder, the prosecutor asked Mr. Schenck "to do a comparison of the tapes and transcripts, [and] it was at that time that I discovered that the tape had been separated from the file." (82 R 1553) Thus, Schenck could testify about the accuracy of the transcript only because he had heard Busby's confession over a year earlier, and had listened to the now lost tape and made a cursory (or "not in a detailed fashion") check for its accuracy only shortly after the defendant had given it (82 R 1554).

Busby objected to the State's efforts to introduce the transcript because "there is no way we can rely on this being a true and accurate depiction of what it is; that is, it's subject to interpretation of whoever transcribe it, not necessarily Mr. Schenck." (82 R 1555)

The prosecutor, admitting it had not tried to have the July 7 statement introduced at the guilt phase of the trial, apparently because he did not have the tape, said that the court should let the jury hear it in the penalty phase because "we have a lesser standard of proof and the rules of evidence are relaxed." (82 R 1555). The court summarily and without any evident concern with or analysis of the problem of the transcript's accuracy ruled the transcript admissible. It did so without any regard to this Court's admonition that he should have used "extreme caution before allowing transcripts of recordings to be view by the jury." Martinez v. State, 761 So. 2d 1074, 1086 (Fla. 2000).[23] The standard of review this Court should use is unclear. Busby contends that while this Court should give the lower court discretion regarding its factual findings

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23 The court also failed to give a cautionary instruction about the use of the transcript. Martinez at 1086.

supported by the record, it should reach its own conclusions about how the law applies to those facts.

Several little used rules of evidence control this issue. First, Section 90.901, Florida Statutes (2000), requires the "Authentication or identification of evidence. . . as a condition precedent to its admissibility." Section 90.952, Florida Statutes (2000), provides that "Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph." Finally, Section 90.953, Florida Statutes (2000), allows a party to use a duplicate of the original document unless, "A genuine question is raised about the authenticity of the original or another other document or writing."

So, in order for the State to use the July 7 confession it needed to produce the original audio tape and have it properly authenticated. If it could not, it had to have a duplicate. The question, thus presented here, is whether the document the prosecutor claimed was a transcript of the July 7 meeting qualified as a duplicate and thus admissible. Or, asked another way, was it relevant?

First, to say what this issue is not about. It is not about using a transcript where part of the audiotape is distorted, unintelligible or garbled. At least we do not know if the tape had those problems. See, Wilson v. State, 680 So. 2d 592 (Fla. 3rd DCA 1996). It is also not about giving the jury a transcript to read as they listen to the audiotape. Duggan v. State, 189 So. 2d 890 (Fla. 1st DCA 1966). Here, the jury did that with the July 3 statement used in the guilt phase of the trial. It did not have that luxury in the penalty phase, the audiotape having disappeared long before that proceeding began. Hunt v. State, 746 So. 2d 559 (Fla. 1st DCA 1999)(Jury may have a transcript of a recorded conversation to aid them in understanding what they heard on the tape.)

What it does involve, as defense counsel argued at trial (82 R 1555), was the accuracy of the transcription. We do not know who did it. Duggan (Transcription inadmissible because, among other reasons, "the court reporter who made that transcript was not present when the recording was made . . ." and could vouch for its accuracy.) No one ever said a professional court reporter made the transcription, and if so, they never complied with Rule 1. 310(f) Fla. R. Civ. P that provides for a transcriber's certification of accuracy. At best, we have Schenck relying on his memory about what was said in an interrogation that had happened a year earlier. While a person who witnessed the questioning in general can testify about the accuracy of a later transcription, Duggan, cited above, Schenck's authentication has problems. See also, Martinez v. State, 761 So. 2d 1074, 1087 (Fla. 2000); Harris v. State, 619 So. 2d 340, 343 (Fla. 1st DCA 1993). At no time did he ever make a "detailed comparison" of the then existent audio tape with the transcription. Indeed, not until that year later did anyone even think to check the accuracy of the tape with the transcript. Also, the State never asked Schenck if he based his conclusion of the transcript's accuracy on an independent knowledge and recollection of the events. That is, was the transcript accurate because that is what he remembered was said, or was it accurate because of what he read? Allen v. State, 492 So. 2d 803 (Fla. 1st DCA 1986); Martinez(participant at conversation can verify accuracy based on her recollection of it.) These unanswered questions and the problems they raised expose the State's failure to provide enough evidence for the trial court to have any confidence that what the jury read was a "duplicate" of the transcript. Since it was not, it had no relevance to the penalty proceeding, even under the "relaxed" rules of evidence the State relied so heavily on to justify introducing this piece of evidence.

As to the harm, the July 7th statement provided evidence to support the especially heinous, atrocious, or cruel and cold, calculated, and premeditated aggravators. Specifically, in that confession Busby admitted helping Globe choke Ard (82 R 1568), he wanted to tear off the victim's head (82 R 1569), after he was dead a "couple of times I would walk over to Ard and tap him on

the head and say, 'How you doing Buddy?'" (82 R 1572), he stuck him in the ear after he was dead, wanted to "pop his eyes out cause I ain't never seen that," and he "hated every single person there." (82 R 1577) The jury could very well have properly or improperly considered that evidence in support of those aggravators. See, Halliwell v. State, 323 So. 2d 557 (Fla. 1975)(What is done to a body after death is irrelevant to the heinous, atrocious, or cruel aggravator.)

The trial court therefore erred in admitting transcript, and this Court should reverse its sentence of death and remand for a new sentencing hearing.

ISSUE VIII

THE COURT ERRED IN FINDING BUSBY MURDERED ELTON ARD IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, A VIOLATION OF THE DEFENDANT'S EIGHTH AMENDMENT RIGHTS.

In sentencing Busby to death, the court found that he had committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Specifically, it rejected his claim he had a pretense of legal justification:

> As justification or excuse for the lulling of Inmate Elton Ard, you, by written and taped statements, have offered the following:
>
> i. You were harassed sexually and as a result of this sexual harassment, Elton Ard deserved to die. This does not constitute a pretense of moral or legal justification.

ii. The murder was committed as a political statement to highlight the unfair treatment of prisoners in the Florida Department of Corrections. This does not constitute a pretense of moral or legal justification.

iii. The murder was committed in retaliation for verbal assaults Inmate Ard made to you. This does not constitute a pretense of moral or legal justification.

(20 R 3897).

The court erred in finding the CCP aggravator because Busby presented competent, substantial evidence to support his claim, the appropriate standard of review this Court should use to review this issue. Alston v. State, 723 So. 2d 148 (Fla. 1998).

This Court has said a lot about what makes a murder cold, calculated, and premeditated. It has said much less about the essentially affirmative defense of a "pretense of moral or legal justification." In fact, only one case, Christian v. State, 550 So. 2d 450 (Fla. 1989), has any significant relevance to resolving the issue presented here. In that case, Alfred Moore and Doy Christian were both inmates at Florida State Prison. One day, Christian caught Moore cheating at cards. Later, Moore, harboring an "insane hatred" of Christian hit him in the back of the head with a 40 pound curling iron, knocking the defendant unconscious. During the next three weeks, Moore kept up a verbal assault on Christian, threatening to kill him and his parents, and to turn him into his homosexual lover.

Finally, something snapped in Chnstian. One day, he saw two guards escort a handcuffed Moore. Grabbing a knife he had, he stalked or rushed up to him and pushed the guards aside. Moore tried to flee, but Christian caught up with him and methodically stabbed the victim 26 times, including wounds to the eyes. Finally, he spit in the man's face, lifted him up, and threw him off the third floor tier of cells. This was a cold, calculated, and premeditated

murder. Christian, however, had a pretense of moral or legal justification, as this Court found. "[T]his record discloses at least a colorable claim that the murder was 'motivated out of selfdefense,' although in a form legally insufficient to serve as a defense to the crime. . . . Christian's attack on Moore was preceded by three weeks of constant harassment and threats." Id. at 452.

Christian's pretense of self-defense arose from a single source-Alfred Moore, and the latter's physical and verbal attacks on him over the short course of three weeks. Busby's claims had no similar single person focus. Instead, a large part of the Columbia Correctional populace wanted to rape him, and the persistent, always present real threat of physical danger, accented by the constant barrage of taunts and harrassment made his situation at least comparable to Christians. Of course, no one had knocked him unconscious, but Ard had attacked him some time before July 3, 2000 (78 R 1034). Finally, unlike the staff at Florida State Prison, the guards at the defendant's prison refused to help him, and indeed, told him they would ignore any attacks made on him (78 R 1054, 1062, 1086-88).

In Mohammad v. State, 494 So. 2d 969 (Fla. 1986), this Court recognized that prison life differs from that in a free society. Besides having many fewer options, there is a strong "wild west" element, where a man is expected to solve his own problems, to do his own time. Thus, when Busby faced an unrelenting and imminent threat of being constantly, daily raped, he had to solve his dilemma himself. Hence, like Christian, he killed Ard as a matter of self-defense, and if the law says that motive cannot provide enough justification in the guilt phase of a trial, it will at least acknowledge the pretense of justification in the penalty phase. Busby committed a cold, calculated, and premeditated murder of Elton Ard, but he had at least a pretense of legal justification in doing so.

This Court should reverse the trial court's judgment and sentence and remand for a new sentencing hearing before a new jury.

ISSUE IX

THE COURT ERRED IN REFUSING TO ADMIT SEVERAL EXHIBITS BUSBY OFFERED DURING THE PENALTY PHASE PORTION OF HIS TRIAL, WHICH WOULD HAVE HELPED THE JURY UNDERSTAND WHY HE HAD BEEN DIAGNOSED AS SUFFERING FROM POST TRAUMATIC STRESS DISORDER, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

During the penalty phase portion of Busby's trial, the defendant sought to introduce several pieces of evidence through Nan Jobson, the social worker who had seen him as a patient for eight years (78 R 1102). Exhibit 74 included a letter "Andy had dictate to me about his mother and his struggles with his mother" along with a "treatment plan diagnosis." (83 R 1751) The court admitted the latter diagnosis, but excluded the letter from Busby because it was hearsay (83 R 1752).[24] Busby also sought to have admitted (again through Ms. Jobson) two videotapes made years before the murder that involved "her and Reverend Busby and Andy acting out different situations as far as trauma to try to resolve the trauma that had occurred to him (83 R 1785). The State again objected because "We are talking about videotape role playing and we are talking about self-serving statements by the defendant." (83 R 1785) The court agreed with the State and excluded them (83 R 1787).[25] In both instances, the court abused the discretion given it in admitting or excluding evidence, and this Court should reverse for a new penalty phase hearing so Busby can present this legitimate mitigating evidence. See, Philmore v. State, 820 So. 2d 919 (Fla. 2002).

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24 The excluded letter was identified as exhibit 74-A (83 R 1754).

25 They are exhibits 73-B and 73-C (83 R 1787).

In Spencer v. State, 645 So. 2d 377, 383-84 (Fla. 1994), this Court found no error in the trial court having admitted the testimony of a police officer about statements the murder victim had made to him.

> Although the testimony involved hearsay, it was admissible under Florida's death penalty statute. During the penalty phase proceedings for capital felonies, "[a]ny such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." 921.141(1), Fla. Stat. (Supp. 1992). This hearsay testimony was probative of both the CCP and HAC aggravating factors as it showed Spencer's intention to kill Karen as well as his intention to punish her. Spencer was also given an opportunity to cross-examine *384 the officer. *Waterhouse* v. *State,* 596 So.2d 1008, 101 6 (Fla.), *cert. denied,* 506 U.S. 957, 113 S.Ct. 418, 121 L.Ed.2d 341 (1992); *see also Clark* v. *State,* 613 So.2d 412, 4 15 (Fla. 1992), *cert. denied,* 510 U.S. 836, 114 S.Ct. 114, 126 L.Ed.2d 79 (1993) (finding hearsay testimony about defendant's prior first-degree murder conviction admissible where defendant afforded opportunity to rebut, even though he did not or could not rebut the testimony).

In this case, the mitigating evidence Busby wanted admitted would have supported his penalty phase claim of extraordinary and extreme child abuse, abuse that reached into his young adulthood. While it would not have excused or exonerated him it did tend to mitigate a death sentence. As such, under Spencer, it was relevant. The State had the opportunity, much as Spencer did, to cross examine Nan Jobson and rebut her testimony if it could.

As such, the court erred, and this Court should reverse its subsequent sentence of death and remand for a new sentencing hearing.

ISSUE X

THE COURT ERRED IN ADMITTING A LETTER BUSBY OSTENSIBLY WROTE TO CHARLES GLOBE BECAUSE ITS PREJUDICIAL VALUE SUBSTANTIALLY OUTWEIGHED ITS LIMITED RELEVANCE, A VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Over defense objection (82 R 1580-81), the State introduced a letter purportedly written by Busby to Charles Globe. The State claimed it had some relevance during the penalty phase portion of the trial to show that Busby was as involved in the murder as his co-defendant . Specifically, in it the defendant said, "Where do you believe I would be right now if it wasn't for you, for your love and support? I would be on trial for another murder." (82 R 1581) Busby, on the other hand argued that "this is a letter that is very explicit and sexual and lurid in nature; it does nothing other than inflame the jury." (82 R 1581). The court, rejecting that claim, admitted it (82 R 1582). That was error because for five pages of the transcript, Karen Smith, a handwriting analyst, read Busby's repeated professions of love for Globe and his explicit sexual desires for the man that had no or little relevance to what penalty Busby should receive (15 R 1583- 1587). Indeed, its overwhelming, explicit sexual content served only to inflame the jury and unfairly prejudice him in their minds. Thus, the trial court abused the discretion given it in matters of this sort by allowing the state to have the female witness read this absolutely lurid letter.

While Busby recognizes that relevant evidence is admissible unless excluded by law. Section 90.402, Florida Statutes (2000). Ruffin v. State, 397 So. 2d 277, 279 (Fla. 1981), he points out that

limits on that general rule exist, some discretionary, and some absolute, that prevent the jury from hearing all relevant evidence. Primarily for this issue, section 90.403 Florida Statutes (2000), prohibits introducing pertinent proof of some fact where the prejudice it would create outweighs its probative value. Of course, parties usually want evidence admitted because it prejudices its opponents, but this court has held that "Only where the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded." Arnoros v. State, 53 1 So. 2d 1256, 1260 (Fla. 1988).

Now, if the State's reason for admitting this steamy homosexual letter was to show Busby's equal participation in the murder, it had no need to use it to do this. It had introduced other evidence in the guilt phase of the trial that did the same thing. Specifically, in the July 3, 2000 joint statement the defendant repeatedly, and for more than 30 transcript pages, implicated himself in the planning and execution of the murder (78 R 1033-68). After the jury heard that they had no need to listen to a letter filled with Busby's nauseating profession of love that had only a brief, tangential allusion to his willingness to lull. All it did was inflame the jury.

In Ruiz v. State, 743 So. 2d 1, 8 (Fla. 1999), the State introduced, at the penalty phase hearing, a two foot by three foot blow-up picture of the victim's headless body and bloody upper torso. The jury had seen the same picture, but in a standard size photo, during the guilt phase portion of the trial. "This was error," this Court held, because "the photo was offered simply to inflame the jury." Accord, Matthews v. State, 772 So. 2d 600 (Fla. 5th DCA 2000) (probative value outweighed by its inflammatory nature and unfair prejudice.)

Because of lurid, sexual content of Busby's letter, its minimal relevance, and its inflammatory nature the court erred in admitting it in the penalty phase of this defendant's trial. This Court

should reverse the trial court's sentence of death and remand for a new sentencing hearing before a new jury.

ISSUE XI

THE COURT ERRED IN SENTENCING BUSBY TO DEATH BECAUSE SECTION 921.141 FLORIDA STATUTES UNCONSTITUTIONALLY ALLOWED THE TRIAL COURT TO SENTENCE HIM TO DO SO WITHOUT, AMONG OTHER THINGS, A UNANIMOUS DEATH RECOMMENDATION FROM THE JURY.

Given the current state of Florida law, Busby acknowledges the futility of raising issues claiming that the United States Supreme Court's opinion in Ring v. Arizona, 536 U.S 584 (2002), and Apprendi v. New Jersey, 530 U.S. 166 (2000), should give him any sentencing relief.

At the trial level, Busby raised the following Ring/Apprendi issues:

1. A request for the jury to find which aggravating factors it found proven beyond all reasonable doubts (11 R 2196,62 R 12374)
2. The jury's death recommendation must be unanimous. (12 R 2269)
3. The jury must unanimously agree regarding each aggravating circumstance found applicable (1 2 R 2269).
4. A motion to declare section 921.141 unconstitutional (15 R 2880).

Trial counsel acknowledged that this Court's opinion in Mills v. State, 536 So. 2d 532, 538 (Fla 2001), had declared that Apprendi had no relevance to Florida's death sentencing scheme (70

R 200). Accordingly, the trial court denied his several motions (13 R 2410, 2415, 2416).

As counsel did at the trial level, appellate counsel confesses to this Court what it already knows: Mills remains good law. Despite the United States Supreme Court's ruling in Ring v. Arizona, 536 U.S. 584 (2002), this Court, as a court, has steadfastly refused to find the State's death penalty statute, in part or in total, in violation of the Sixth Amendment to the United States Constitution. Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); Kormondy v. State, Case No. SC 96197 (Fla. Feb. 13, 2003). Busby raises this issue, not in hopes that it will be swayed by the logic and persuasiveness of his argument, which will be brief, but to preserve this issue in case Harry Potter waves his wand and this Court reverses itself. Because this issue involves a pure question of law, this Court can review it de novo.

Busby specifically argues that the Sixth Amendment requires Florida juries to unanimously recommend death before the trial judge can impose that sentence. Relying on precedent from the United States Supreme Court and a pre-Furman v. Georgia, 408 U.S. 238 (1972), death penalty case this Court has held that jury unanimity in capital sentencing has no of due process limitations. Alvord v. State, 322 So.2d 533 (Fla.1975); Johnson v. Louisiana, 406 U.S. 356 (1972) "We do find that unanimity is necessary when the jury considers this issue." This Court reaffirmed that position recently. Evans v. State, 800 So. 2d 182, 197 (Fla ,2001); Sexton v. State, 775 So. 2d 923, 937 (Fla. 2000); Bottoson v. Moore, cited above (Shaw, concurring).

Johnson, however, was a non capital case, and that is a significant distinction. In death sentencing, the United States Supreme Court has found that states must ensure not only that defendants receive due process, but a "super due process." See, Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1 986). For example, capital defendants have a due-process right to a state-provided psychiatrist to help prepare

his defense. Ake v. Oklahoma, 470 U.S. 68 (1985). The sentencer cannot consider information unavailable to the defendant. Gardner v. Florida, 407 U.S. 349 (1977). This Court has also said sentencing orders, unlike their non capital counterparts, must be unmistakably clear. Mann v State, 420 So. 2d 578, 581 (Fla. 1982); the sentencers can only consider specifically legislatively created aggravators, State v. Dixon, 283 So. 2d 1 (Fla. 1972); and only relevancy limits mitigation limited. Lockett v. Ohio, 438 U.S. 586 (1978).

Thus, with the jury being a key, core part of Florida's split sentencing scheme, Espinosa v. Florida, 505 US. 1079 (1992), an equally vital component is their unanimity in recommending death. The utter finality of that punishment and the heightened due process required before it can be imposed demands no less than the community's united decision that a defendant deserves to die.

In short, before a judge can impose a sentence of death Ring requires the jury to have authorized it. See also, United States v. Harris, __ U.S.__ , 112 S. Ct. 2406, 153 L. Ed. 2d 524 (2002). Busby simply argues that without the united, unanimous voice of the community that he deserves to die, it has not approved a death sentence.

The Appellant, therefore, respectfully asks this honorable Court to declare Section 921.141 unconstitutional for any or all of the reasons presented here, and remand his case for imposition of a life sentence.

ISSUE XI1

THE COURT ERRED IN ALLOWING THE STATE TO PRESENT EVIDENCE BEYOND THE FACT THAT BUSBY HAD TWO PRIOR FIRST DEGREE MURDER CONVICTIONS IN SUPPORT OF THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR, A VIOLATION OF

THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

This issue, like the previous one, has been decided against Busby. He raises it, again like the previous one, in the hopes that someday this Court will come to its senses and realize the mistake it has made and grant the defendant relief. At trial, he asked the court to limit the use of his two prior convictions for first degree murder. Specifically, he argued that the United States Supreme Court's opinion in Old Chief United States, 519 U.S. 172 (1997), prevented the State from presenting the facts of the murders to support the aggravating factor that he had a prior conviction for a capital or violent felony. Section 921.141(5)(a), Florida Statutes (2000). (82 R 1535). He also relied on this Court's opinion in Brown v. State, 719 So. 2d 882 (Fla. 1998). (82 R 1535). The trial court rejected his request, and because its ruling involved only a matter of law, this Court can review it de novo.

Recently, this Court in Cox v. State, 819 So. 2d 705, 7 15-716 (Fla. 2002), affirmed a trial court's similar ruling.

> We have consistently stated that "any relevant evidence as to the defendant's character or the circumstances of the crime is admissible [during capital] sentencing" proceedings. . . .Thus, the holdings of Old Chief and Brown are not properly analogized to this capital sentencing proceeding, where "the point at issue" is much more than just the defendant's "legal status."

Busby respectfully asks this honorable Court to reconsider Cox because in this case the prejudicial impact of facts surrounding the two murders he had committed outweighed any probative value they may have had. After all, a criminal defendant can have no worse criminal record than to have committed a murder, except to have committed two murders. That fact is the major reflection on his character, and the marginal weight given it as an aggravator is

substantially outweighed by the prejudicial impact it has on the jury. That is the fundamental holding of Old Chief, and however it may apply in capital sentencing in general, in this case it had a significant unfair weight.

This Court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE XIII

THE TRIAL COURT ERRED IN REPEATEDLY INSTRUCTING THE JURY THAT THEIR RECOMMENDATION WAS JUST THAT, A RECOMMENDATION, A VIOLATION OF BUSBY'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Before the penalty phase jury heard any testimony regarding what aggravating and mitigating factors existed, after they had heard all the evidence, and after the court had instructed the jury on the relevant law, Busby objected to several of the penalty phase instructions because they diminished the role of the jury in sentencing the defendant to death (82 R 1545-47, 84 R 1795, 1818-19). The court denied those complaints (82 R 1547, 84 R 1795, 1819). He had also filed a pre-trial motion raising the same issue that also included several proposed jury instructions (11 R 2 199-12 R 2258), which the court denied (13 R 2406). These requests took legal strength from the United State Supreme Court's opinion in Caldwell v. Mississippi, 472 U.S. 320 (1985). In that case,

> [T]he State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated."

472 U.S. at 341. As with the two prior issues, this one involves a pure question of law, which should be reviewed de novo.

This Court has repeatedly and recently held that the standard penalty phase jury instructions comply with Caldwell. "This Court will note that the Florida Standard Jury Instructions have been determined to be in compliance with the requirements of Caldwell." Burns v. State, 699 So. 2d 646, 654 (Fla. 1997); Sochor v. State, 619 So. 2d 285, 291-92 (Fla. 1993); Thomas v. State, 28 Fla. L. Weekly S106 (Fla. January 30, 2003).

Despite these rulings, Busby asks this Court to reconsider its rulings in those cases in light of Justice Lewis's concurring and dissenting opinion in Bottoson v. Moore, 833 So. 2d 693, 731-34 (Fla. 2002). In that case, Justice Lewis had great trouble approving those instructions because of their "tendency to minimize the role of the jury," and the trial court's added explanation of Florida's death penalty scheme. "I question whether a jury in situations such as this can have the proper sense of responsibility with regard to finding aggravating factors or the true importance of such findings as now emphasized in Ring [v. Anzona, 536 U.S. 584 (2002)]." Id.

Busby asks this Court to listen to Justice Lewis' argument. In this case, it has particular resonance because within the space of eight pages, the jury was told ten times that their sentence was merely advisory (84 R 1854-61). When the judge repeatedly, repeatedly, repeatedly let them know that he had the responsibility to sentence Busby and never told them that it had to give "great weight" to their decision, then Justice Lewis' concerns raises to the point of prophesy. Tedder v. State, 322 So. 2d 908 (Fla 1975). The jury instructions used in the penalty phase portion of a capital trial generally and in this case specifically fail to eliminate the Caldwell problem.

This Court should reverse Busby's sentence of death and remand for a new sentencing hearing.

CONCLUSION

Based on the arguments presented here, the Appellant, Andrew Busby, respectfully asks this honorable Court to 1. Reverse the trial court's judgment and sentence and remand for a new trial. Or, 2. Reverse the trial court's sentence of death and remand for a new sentencing hearing before a jury

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to **CURTIS FRENCH**, Assistant Attorney General, The Capital, Tallahassee, FL 32399-1050; and to appellant, **ANDREW DARRYL BUSBY**, #V03727, Florida State Prison, 7819 NW 28th Street, Raiford, FL 32026, on this date, April 10,2003.

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that pursuant to Rule 9.201(a)(2), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

_____

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IN THE SUPREME COURT OF FLORIDA

ANDREW DARRYL BUSBY,

Appellant,

vs. **Case No. SC 02-1364**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT, IN AND FOR
COLUMBIA COUNTY, FLORIDA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES vi

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND OF THE FACTS 2

SUMMARY OF THE ARGUMENT 23

ARGUMENTS

ISSUE I

WHETHER THE TRIAL COURT DID NOT VIOLATE APPELLANT'S RIGHT TO AN IMPARTIAL JURY UPON REJECTING BUSBY'S MOTION TO STRIKE FOR CAUSE VENIREMAN KIM LAPAN? 30

ISSUE II

WHETHER THE TRIAL COURT PROPERLY EXCLUDED BUSBY'S POST-TRAUMATIC STRESS DISORDER EXPERT TESTIMONY DURING THE GUILT PHASE OF TRIAL IN FURTHERANCE OF HIS CLAIM OF SELF-DEFENSE? 36

ISSUE III

WHETHER THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF THE INVESTIGATOR FOR THE STATE ATTORNEY'S OFFICE AND APPELLANT'S PROFFER TO EXCLUDE THAT TESTIMONY? 39

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY ADMITTED CO-DEFENDANT'S VIDEOTAPED TESTIMONY UPON DEFENDANT'S OWN REQUEST RATHER THAN AS LIVE TESTIMONY THAT THE DEFENSE DID NOT WANT? 45

ISSUE V

WHETHER THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S STATEMENTS PROVIDED ON JULY 3, 2000 AND JULY 7, 2000? 51

ISSUE VI

WHETHER THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT BUSBY AND HIS CO-DEFENDANT HAD TARGETED, ATTEMPTED TO LURE, AND PLANNED TO KILL TWO OTHER INMATES IN THE MANNER IN WHICH THEY ACTUALLY MURDERED THE VICTIM IN THIS CASE? 61

ISSUE VII

WHETHER THE TRIAL COURT PROPERLY ADMITTED THE TRANSCRIPT OF APPELLANT'S JULY 7, 2000 STATEMENT DURING THE PENALTY-PHASE? 66

ISSUE VIII

WHETHER THE TRIAL COURT PROPERLY HELD THAT THE STATE ESTABLISHED BEYOND A REASONABLE DOUBT THAT BUSBY COMMITTED THE MURDER IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT PRETENSE OF MORAL OR LEGAL JUSTIFICATION? 71

ISSUE IX

WHETHER THE TRIAL COURT PROPERLY EXCLUDED, DURING THE PENALTY-PHASE OF TRIAL, APPELLANT'S PROFFERED EVIDENCE INCLUDING HEARSAY STATEMENTS? 78

ISSUE X

WHETHER THE TRIAL COURT PROPERLY ADMITTED, DURING THE PENALTY-PHASE OF TRIAL, APPELLANT'S LETTER WRITTEN TO HIS CO-DEFENDANT? 80

ISSUE XI

WHETHER THE TRIAL COURT PROPERLY SENTENCED APPELLANT TO DEATH UPON THE JURY'S RECOMMENDATION OF DEATH BY A VOTE OF 11-1? 84

ISSUE XII

WHETHER THE TRIAL COURT PROPERLY PERMITTED THE STATE TO PRESENT EVIDENCE OF THE CIRCUMSTANCES UNDERLYING BUSBY'S PRIOR CONVICTIONS FOR FIRST DEGREE MURDER IN SUPPORT OF THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE? 86

ISSUE XIII

WHETHER THE PENALTY-PHASE STANDARD JURY INSTRUCTIONS VIOLATE CALDWELL v. MISSISSIPPI? 89

ISSUE XIV

WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT A CONVICTION OF FIRST DEGREE PREMEDITATED MURDER AND WHETHER DEATH IS THE PROPORTIONATE SENTENCE? 92

CONCLUSION 96

CERTIFICATE OF SERVICE 97

CERTIFICATE OF TYPE SIZE AND STYLE 97

TABLE OF AUTHORITIES

Pages

CASES

Agan v. State, 445 So.2d 326 (Fla. 1983), cert. denied, 469 U.S. 873 (1984) 95

Allen v. State, 492 So.2d 802 (Fla. 1st DCA 1986) ... 68-69, 69

Almeida v. State, 748 So.2d 922 (Fla. 1999), cert. denied, 528 U.S. 1181 (2000) 60, 65, 70

Apprendi v. New Jersey, 530 U.S. 466 (2000) 84

Banda v. State, 536 So.2d 221 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989) 73

Barnhill v. State, 834 So.2d 836 (Fla. 2002) 94-95, 95

Bell v. State, 699 So.2d 674 (Fla. 1997), cert. denied, 522 U.S. 1123 (1998) 75

Bell v. State, 841 So.2d 329 (Fla. 2002) 22

Blackwood v. State, 777 So.2d 399 (Fla. 2000), cert. denied, 122 S.Ct. 2603 (2002) 95

Bottoson v. Moore, 833 So.2d 693 (Fla.), cert. denied, 123 S.Ct. 662 (2002) 89, 91

Bowen v. State, 404 So.2d 145 (Fla. 2nd DCA 1981) 55

Bowles v. State, 716 So.2d 769 (Fla. 1998) 82

Bowles v. State, 804 So.2d 1173 (Fla. 2001), cert. denied, 122 S.Ct. 2603 (2002) 95

Bradley v. State, 787 So.2d 732 (Fla.), cert. denied,
534 U.S. 1048 (2001) 92-93

Brown v. State, 721 So.2d 274 (Fla. 1998), cert. denied,
526 U.S. 1102 (1999) 73, 90

Bryant v. State, 601 So.2d 529 (Fla. 1992) 33-34

Burns v. State, 699 So.2d 646 (Fla. 1997), cert. denied,
522 U.S. 1121 (1998) 89, 90

Caldwell v. Mississippi, 472 U.S. 320 (1985) ... 28, 89, 90, 91

Chandler v. Moore, 240 F.3d 907 (11th Cir.), cert. denied,
534 U.S. 1057 (2001) 32

Christian v. State, 550 So.2d 450 (Fla. 1989), cert. denied,
494 U.S. 1028 (1990) 76

Cole v. State, 841 So.2d 409 (Fla. 2003) 84

Conahan v. State, 844 So.2d 629 (Fla. 2003) 63

Connor v. State, 803 So.2d 598 (Fla. 2001), cert. denied,
535 U.S. 1103 (2002) 52

Coolen v. State, 696 So.2d 738 (Fla. 1997) 64

Cox v. State, 819 So.2d 705 (Fla. 2002), cert. denied,
123 S.Ct. 889 (2003) ... 28, 72 n.10, 73, 86, 86-87, 95

Damren v. State, 696 So.2d 709 (Fla. 1997), cert. denied,
522 U.S. 1054 (1998) 64

Doorbal v. State, 837 So.2d 940 (Fla. 2003) 85

Duest v. State, ___ So.2d ___, 2003 Fla. LEXIS 1069 (Fla. Jun. 26, 2003) 72-73, 85, 94

Dugger v. Adams, 489 U.S. 401 (1989) 90

Floyd v. State, ___ So.2d ___, 27 Fla. L. Weekly S697 (Fla. Aug. 22, 2002) 90

Goodwin v. State, 751 So.2d 537 (Fla. 1999) 50

Gore v. State, ___ So.2d ___, 28 Fla. L. Weekly S334 (Fla. Apr. 17, 2003) 42, 58, 91

Griffin v. State, 639 So.2d 966 (Fla. 1994), cert denied, 514 U.S. 1005 (1995) 64, 79

Grimes v. State, 244 So.2d 130 (Fla. 1971) 69

Harrell v. State, 709 So.2d 1364 (Fla.), cert. denied, 525 U.S. 903 (1998) 50

Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991), cert. denied, 502 U.S. 1077 (1992) 32

Henry v. State, 574 So.2d 66 (Fla. 1991) 55

Hildwin v. State, 531 So.2d 124 (Fla. 1988), cert. granted on other grounds and aff'd, 490 U.S. 638 (1989) 67

Jackson v. State, 704 So.2d 500 (Fla. 1997) 73, 76

Jennings v. State, 718 So.2d 144 (Fla. 1998), cert. denied, 527 U.S. 1042 (1999) 56

Johnson v. State, 660 So.2d 637 (Fla. 1995) 31 n.5

Johnson v. State, 660 So.2d 648 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996) 59

Jones v. State, 440 So.2d 570 (Fla. 1983) 57

Jones v. State, 612 So.2d 1370 (Fla. 1992), cert. denied, 510 U.S. 836 (1993) 73

Jones v. State, ___ So.2d ___, 28 Fla. L. Weekly S395 (Fla. May 8, 2003) 91

Jordan v. State, 334 So.2d 589 (Fla. 1976) 57

Justus v. State, 438 So.2d 358 (Fla. 1983), cert. denied, 465 U.S. 1052 (1984) 68

Kearse v. State, 770 So.2d 1119 (Fla. 2000) 33

Kelly v. Lynaugh, 862 F.2d 1126 (5th Cir. 1988), cert. denied, 492 U.S. 925 (1989) 55-56

Kilgore v. State, 688 So.2d 895 (Fla. 1996), cert. denied, 522 U.S. 832 (1997) 95

Knight v. State, 746 So.2d 423 (Fla. 1998), cert. denied, 528 U.S. 990 (1999) 22

Lawrence v. State, 691 So.2d 1068 (Fla.), cert. denied, 522 U.S. 880 (1997) 79

Lugo v. State, ___ So.2d ___, 28 Fla. L. Weekly S159 (Fla. Feb. 20, 2003) 85

Lukehart v. State, 776 So.2d 906 (Fla. 2000), cert. denied, 533 U.S. 934 (2001) 56

Lusk v. State, 446 So.2d 1038 (Fla.), cert. denied,
469 U.S. 873 (1984) 33, 34, 95

Mansfield v. State, 758 So.2d 636 (Fla. 2000), cert. denied,
532 U.S. 998 (2001) 50, 59, 94

Marshall v. State, 604 So.2d 799 (Fla. 1992) 95

Marshall v. State, ___ So.2d ___, 2003 Fla. LEXIS 1056
(Fla. June 12, 2003) 42, 58

Maryland v. Craig, 497 U.S. 836 (1990) 50

McCall v. State, 463 So.2d 425 (Fla. 3rd DCA 1985) 69-70

McGautha v. California, 402 U.S. 183 (1971) 43

Mendoza v. State, 700 So.2d 670 (Fla. 1997), cert. denied,
525 U.S. 839 (1998) 78-79, 79

Mendyk v. State, 545 So.2d 846, 849 (Fla.), cert. denied,
493 U.S. 984 (1989) 82-83

Michigan v. Mosley, 423 U.S. 96 (1975) 55

Miranda v. Arizona, 384 U.S. 436 (1966) 53, 53 n.6, 55, 57, 58, 59

Morgan v. State, 415 So.2d 6 (Fla), cert. denied, 459 U.S. 1055
(1982) 34

Nelson v. State, 748 So.2d 237 (Fla. 1999), cert. denied,
528 U.S. 1123 (2000) 58 n.7

Nelson v. State, ___ So.2d ___, 27 Fla. L. Weekly S797
(Fla. Oct. 3, 2002) 52, 95

Ocha v. State, 826 So.2d 956 (Fla. 2002) 95

Orme v. State, 677 So.2d 258 (Fla.1996), cert. denied, 519 U.S. 1079 (1997) 94-95

Penn v. State, 574 So.2d 1079 (Fla. 1991) 35

Pentecost v. State, 545 So.2d 861 (Fla. 1989) 30, 33

Perry v. State, 801 So.2d 78 (Fla. 2001) 67, 80, 81

Peterka v. State, 640 So.2d 59 (Fla. 1994), cert. denied, 513 U.S. 1129 (1995) 55

Pope v. State, 441 So.2d 1073 (Fla. 1983) 50

Porter v. Crosby, 840 So.2d 981 (Fla. 2003) 84

Ramirez v. State, 739 So.2d 568 (Fla. 1999) 56, 56-57

Reaves v. State, 639 So.2d 1 (Fla.), cert. denied, 513 U.S. 990 (1994) 31

Rhodes v. State, 547 So.2d 1201 (Fla. 1989) 81

Ring v. Arizona, 536 U.S. 584 (2002) 27, 84

Rodriguez v. State, 609 So.2d 493 (Fla. 1992) 74, 88

Rodriguez v. State, 753 So.2d 29, 44 (Fla.), cert. denied, 531 U.S. 859 (2000) 66-67, 79, 81, 88

Rollins v. State, 148 So.2d 274 (Fla. 1963) 35

Ross v. Oklahoma, 487 U.S. 81 (1988) 31, 32

Rutherford v. State, 727 So.2d 216 (Fla. 1998) 67, 81

Simmons v. United States, 390 U.S. 377 (1968) 42

Smith v. State, 711 So.2d 581 (Fla. 2nd DCA 1998) 83

Sochor v. State, 619 So.2d 285 (Fla.), cert. denied, 510 U.S. 1025 (1993) 89

Spann v. State, ___ So.2d ___, 28 Fla. L. Weekly S293 (Fla. Apr.3, 2003) 74, 87-88

Spencer v. State, 615 So.2d 688 (Fla. 1993) 11, 11 n.3

State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) 60, 65, 70

State v. Hostzclaw, 351 So.2d 1033 (Fla. App. 1976) 59

State v. Mizell, 773 So.2d 618 (Fla. 2000) 36

State v. Polanco, 658 So.2d 1123 (Fla. 3rd DCA 1995) 59

State v. Williams, 465 So.2d 1229 (Fla. 1985) 34-35

Stewart v. State, 549 So.2d 171 (Fla. 1989), cert. denied, 497 U.S. 1032 (1990) 79

Taylor v. State, ___ So.2d ___, 28 Fla. L. Weekly S439 (Fla. Jun. 5, 2003) 92, 94

Thibault v. State, ___ So.2d ___, 28 Fla. L. Weekly S486 (Fla. Jun. 26, 2003) 84-85

Thomas v. State, 838 So.2d 535 (Fla. 2003) 89, 91

Toledo v. State, 452 So.2d 661 (Fla. 3rd DCA 1984) 37

Trotter v. State, 576 So.2d 691 (Fla. 1990) 32

United States v. Martinez-Salazar, 528 U.S. 304 (2000) 32, 32-33

United States v. Pena-Corea, 165 F.3d 819 (11th Cir. 1999) 43-44

Valdes v. State, 626 So.2d 1316 (Fla. 1993), cert. denied, 512 U.S. 1227 (1994) 31

Walls v. State, 641 So.2d 381 (Fla. 1994), cert. denied, 513 U.S. 1130 (1995) 73, 74

Warren v. State, 577 So.2d 682 (Fla. 1st DCA 1991) 37

Weiand v. State, 732 So.2d 1044 (Fla. 1999) 37

Williams v. State, 110 So.2d 654 (Fla. 1959) 61, 61 n.8, 63

Williamson v. State, 511 So.2d 289 (Fla. 1987), cert. denied, 485 U.S. 929 (1988) 72 n.10, 73, 76, 76-77, 95

Wuornos v. State, 644 So.2d 1000 (Fla. 1994), cert. denied, 514 U.S. 1069 (1995) 73, 73-74

Young v. State, 579 So.2d 721 (Fla. 1991), cert. denied, 502 U.S. 1105 (1992) 93

Zack v. State, 753 So.2d 9 (Fla.), cert. denied, 531 U.S. 858 (2000) 76, 79

Zant v. Stephens, 462 U.S. 862 (1983) 88

CONSTITUTIONAL PROVISIONS, ACTS, STATUTES AND RULES

Section 90.402, Florida Statutes 64

Section 90.403, Florida Statutes 82

Section 90.404, Florida Statutes 61, 62

Section 90.901, Florida Statutes 69

Section 90.952, Florida Statues 68

Section 90.953, Florida Statutes 68

Section 921.141, Florida Statutes 26, 27, 28, 66, 78, 80, 82, 83, 88

Fla. R. App. P. 9.210(b)(3) 1, 97

PRELIMINARY STATEMENT

Appellant, Andrew Darryl Busby, appeals from the judgment of conviction and sentence of death imposed by the Circuit Court of the Third Judicial Circuit, Columbia County, Florida, following a jury verdict finding him guilty of one count of murder in the first degree and recommending a death sentence. References to appellant will be to "Busby" or "Appellant," and references to appellee will be to "the State" or "Appellee." The record on appeal consists of eighty-six volumes. For the convenience of the Court, the State will cite to the record in a manner similar to that used by the Appellant, i.e., to the clerk's record on appeal as "R.," with the appropriate volume number and page citations as required by Fla. R. App. P. 9.210(b)(3).

STATEMENT OF THE CASE AND OF THE FACTS[1]

Trial Proceedings

Andrew Darryl Busby was charged by indictment in the Circuit Court of Columbia County, Florida, on August 17, 2000, with the first-degree murder of Elton Ard (R. 1:1). Ard, a fellow inmate of the Department of Corrections at the Columbia Correctional Institution (hereinafter "CCI") (R. 1:1), was murdered on July 3, 2000 (R. 1:1). A co-defendant, Charles Globe (hereinafter "Globe"), was also indicted and convicted in a separate trial of the murder (R. 1:1).[2] The jury found Busby guilty as charged on March 15, 2002 (R. 17:3360). The case then proceeded to the penalty-phase (R. 82:1547), where the jury subsequently

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1 To avoid repetition, all relevant facts beyond those directly related to the offense will be set forth under the specific issue to which they apply.

2 Globe also received a death sentence upon a jury's recommendation. State of Florida v. Charles Globe, No. 00-897CF A. Briefs have been filed in Globe's appeal before this Court, cause number SC02-39, and oral argument is scheduled for October 7, 2003.

recommended that Busby be sentenced to death, by a vote of 11 to 1 (R. 84:1864).

Guilt-phase:

Evidence adduced at the guilt-phase of trial established the following:

Busby and his homosexual partner and fellow inmate, Globe (R. 78:1027), decided that they were going to kill someone (R. 78:1028). Ard was one of seven potential victims (R. 78:1028), targeted because he was harassing Busby (R. 78:1028-1029). Busby had originally wanted to kill Robert Rosa Torado, because Torado was HIV-positive and Busby had been having sex with him (R. 78:1051-1052). For two months Busby and Globe tried to get to Torado to kill him (R. 78:1052-1053). For the three days preceding Ard's death, Busby and Globe intended on killing Ard but they did not have the opportunity (R. 78:1035). Busby, using sign-language, told Globe the night of July 2 that they would go ahead with their plan to kill Ard after breakfast the next day (R. 78:1035-1036).

The following morning, on July 3, 2000, at approximately 7:00 a.m., Globe slipped into the prison cell shared by Ard and Busby, after they had returned from breakfast (R. 78:1037). After locking the cell door and putting something up to block the window, Globe grabbed Ard around the neck and they struggled (R. 78:1037-1039). Globe placed one of the garrotes he made around Ard's neck, but it broke as Globe was choking Ard (R. 78:1039-1040). Busby then moved in and kneed Ard in the stomach (R. 78:1040). Both Busby and Globe choked Ard (R. 78:1040, 1041). The broken garrote was flushed down the toilet (R. 78:1040). Ard pled for his life, offering to give both men all of his money, a total of forty-five dollars (R. 78:1040). Busby beat Ard in the face, causing him to bleed (R. 78:1043). After discovering that Ard was still alive, a second garrote was tied around Ard's neck (R. 78:1044). Globe and Busby then lit cigarettes and watched Ard gasp for air six times before he finally died (R. 78:1044). Afterwards, Globe removed the

garrote from Ard's neck and tied it around Ard's wrist, and put a cigarette in Ard's mouth and a lighter in his hand (R. 78:1045).

During a prisoner count at approximately 9:00 a.m., Correctional Officer Tonya Nix found Globe locked inside of Ard and Busby's cell (R. 76:871). At the time, Ard appeared to be dead (R. 76:871). Nix called for assistance and notified medical, and had Globe and Busby removed from the cell, which was ordered secured until the Florida Department of Law Enforcement (hereinafter "FDLE") could arrive to begin their investigation (R. 76:872). Linda Summerall, a nurse at CCI, found that Ard did not have a pulse or blood pressure and was not breathing (R. 77:928-929). The following day Dr. Matthew Areford, M.D., performed an autopsy on Ard, determining that he had died from strangulation, and that he would have taken anywhere from two to eight minutes to have died from the strangulation (R. 77:963, 964-965). Dr. Areford further testified that Ard had injuries consistent with blunt force blows to his head, which did not contribute to his death (R. 77:973, 974). The ligature or garrote was consistent with the pattern of bruising found on Ard's neck, and the injuries were consistent with a "sleeper hold." (R. 77:967-968, 971).

Evidence recovered from the murder scene included a handwritten sign and photographs of writings on the prison wall (R. 76:885-887), the magic marker used to make the writings (R. 76:888), photographs of fingerprints in blood (R. 76:888-889), and the cigarette lighter found in Ard's hand and the cigarette placed in Ard's mouth (R. 76:889-890). Karen Smith, a crime laboratory analyst and forensic document examiner with FDLE, testified that of the sign and writings on the cell wall, Globe had written "Call FDLE. Thanks" (R. 77:999-1000) and "Remember Andy and K.D., 7-3-2000" (R. 77:1002). Smith had no opinion, however, as to who had written "Don't forget to look on the door" (R. 77:1001).

After the State rested its case-in-chief, Appellant moved for a judgment of acquittal (R. 78:1095-1097), which the trial judge denied (R. 78:1099).

Busby did not testify at the guilt-phase of his trial, but he did present the video-taped testimony of Globe (R. 79:1228-1283) and live testimony from a fellow inmate (R. 80:1292-1305). Globe testified to the following: Busby thought that Globe was going to beat up Ard (R. 79:1231), Globe "snapped" after he thought Ard had already had sex with Busby (R. 79:1237-1238), Busby told Globe not to choke Ard and tried to separate Globe from Ard (R. 79:1240, 1244), and Busby and Globe lied throughout the July 3, 2000 statement (R. 79:1260-1261). Fellow inmate Charles Konetski testified to the following: he came to know Busby at CCI and that Busby was very friendly (R. 80:1293), Busby was sexually harassed (R. 80:1298), Konetski tried to stop the harassment by reporting it (R. 80:1298-1300), and Busby looked like he weighed 110 pounds and was nine-years-old (R. 80:1301). During cross-examination, the State established that Konetski resided at CCI and only knew Busby from December 30, 1998 to March 16, 1999 (R. 80:1296).

The State then presented testimony in rebuttal. Inspector Jack Schenck with the Inspector General's Office of the Florida Department of Corrections testified regarding Busby's July 7, 2000 statement, that Busby had been advised of his rights and waived same (R. 81:1386), that Busby asked Globe to make something that they could use to strangle someone (R. 81:1386), and that Busby had wanted to decapitate Ard but did not have anything sharp to use and wanted to poke out Ard's eyes but Globe talked him out of it (R. 81:1388). Instead, Busby poked Ard's ear (R. 81:1388). An investigator with the State Attorney's Office, Lisa Long, also testified in rebuttal (R. 81:1390-1391), and Busby's proffer offered to preclude Long's testimony was read to the jury (R. 81:1392-1394).

Busby then presented Globe's surrebuttal testimony, that he did not see Appellant's hand gestures, and even if he had, it would not have affected his testimony (R. 81:1411). Busby renewed his motion for judgment of acquittal (R. 81:1414-1415), which the trial judge denied (R. 81:1420). At the close of the evidence,

instructions, and argument by counsel, the jury found Appellant guilty as charged (R. 81:1524).

Penalty-phase:

During the penalty-phase of the trial, the State relied upon the evidence adduced during the guilt-phase as well as additional evidence.

The State presented the testimony of Inspector Schenck, who testified regarding his interview of Busby on July 7, 2000 (R. 82:1550-1579). Busby was advised of his rights and agreed to talk to Schenck (R. 82:1551). Busby asked Globe to make the garrotes so that they could strangle who they ultimately decided to kill (R. 82:1565). Though Busby wanted to kill Torado (R. 82:1565), they decided to kill Palmer when they realized they could not get to Torado (R. 82:1567). When they could not get to Palmer, they turned their attention to Ard (R. 82:1568). On both Friday and Saturday, Globe and Busby were not able to kill Ard because he had to go the Y dorm (R. 82:1568). Busby could not remember why they did not try to kill Ard on Sunday (R. 82:1568). Both Busby and Globe choked Ard to death (R. 82:1568). Busby hit Ard in the face three or four times (R. 82:1570). In reference to killing Ard, Busby said "This son of a bitch right here was a pleasure." (R. 82:1578).

The State also presented two letters written by Busby; one to his stepfather Jim Waite (R. 82:1587-1591), and one to Globe (R. 82:1583-1587).

Further, the State presented to the jury Busby's statement to police from the investigation into two other murders that he had previously committed (R. 82:1616-1634).

Busby presented testimony from a number of witnesses, including his adoptive father Reverend Walter L. Busby, an employee of the Department of Children and Families (hereinafter

"DCF"), former inmate Charles Konetski, and a licensed clinical social worker.

Reverend Busby testified that Appellant came to live with him when he was around age eleven (R. 83:1660-1661), and that Busby was deemed an emotionally handicapped child at school (R. 83:1661-1662). Reverend Busby had read that Appellant had been sexually abused when he was three or four years old (R. 83:1694). Appellant began receiving counseling with Nan Jobson while living in the former foster home (R. 83:1663, 1731), continued with therapy for some time (R. 83:1731), and was treated with medication for depression (R. 83:1670). Reverend Busby adopted Appellant (R. 83:1666), but Busby's mom "popped up" (R. 83:1672-1673) and Busby had a love-hate relationship with her (R. 83:1673). Busby dropped out of school in twelfth grade (R. 83:1676). Reverend Busby further testified to how often he visited Busby and spoke with him upon his incarceration (R. 83:1677-1678), that he was aware that Busby was smaller and younger than most at CCI (R. 83:1679), that Busby was being sexually harassed (R. 83:1681), and that he missed his visit with Busby right before Ard was murdered (R. 83:1683). Reverend Busby opined that Busby's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired on July 3, 2000 (R. 83:1685-1686). Reverend Busby also believed that Globe was using Busby (R. 83:1689). Busby had a good work record when he wanted to work (R. 83:1695).

Susan Bell, an adoption specialist with DCF, identified various records maintained by DCF concerning Busby's foster care placement, treatment, and adoption (R. 83:1701-1714).

Charles Konetski, a former inmate, testified at the penalty-phase consistent with his guilt-phase testimony (R. 83:1714-1722).

Nan Jobson, a licensed clinical social worker, testified regarding her treatment of Busby beginning when he was ten years

of age (R. 83:1728), and that Busby had been seen by many therapists before her (R. 83:1729). Jobson testified as to the effect that the sexual abuse by his father, sister, and sister's boyfriend had upon him, as well as having been verbally and physically abused by his mother and repeatedly abandoned by her, and having been abused by his foster parents (R. 83:1735-1736). Jobson testified that Busby attempted suicide at age six (R. 83:1745), and that Busby suffered from post-traumatic stress disorder and that he would respond in life as the result of his past to various "triggers." (R. 83:1754-1757). Jobson last treated Busby when he was age seventeen (R. 83:1767). However, in a letter to Busby dated April, 1998, she referred to him as "Dearest Andy" (R. 83:1774-1775). Jobson also admitted that she winked at Busby when she testified during the guilty-phase of trial (R. 83:1775). During cross-examination, Jobson admitted that Busby wished his foster mother's unborn child was dead (R. 83:1771-1772), and that Busby's biological mother had given him up because she was afraid he would kill her (R. 83:1773).

The jury was instructed on the following aggravating circumstances:

> First, that the crime for which Andrew Busby is to be sentenced was committed while he was under sentence of imprisonment.
>
> Secondly, that the defendant has been previously convicted of another capital offense or for felony involving the use of violence to some person.
>
> . . . . The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.

* * * * *

> . . . . The crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> * * * * *

(R. 84:1855-1857). After the close of the evidence, instructions, and arguments by counsel, on March 22, 2002, the jury recommended the death penalty by a vote of 11-1 (R. 84:1864).

A Spencer[3] hearing was held on April 2, 2002, wherein no additional evidence was presented.

On May 16, 2002, the trial court ultimately followed the jury's recommendation and sentenced Appellant to death (R. 86:1915).

The trial court considered the following factors as possible mitigating evidence and the weight to be given to each: "First, the crime for which you, Mr. Busby, are to be sentenced was committed while you were under the influence of extreme or emotional disturbance according to the defense. . . . The Court considered this mitigating circumstance and finds that it does not exist." (R. 86:1904-1905); "You agreed that you were an accomplice in the capital felony committed by another person, and that your participation was relatively minor. . . . [T]he Court finds this mitigator does not exist." (R. 86:1906); "You next asserted that you acted under extreme duress or under the substantial domination of another person. . . . [T]he Court in fact finds that that mitigator does not exist." (R. 86:1906); "Next was raised your capacity to appreciate the criminality of your conduct or to conform your conduct to the requirements of the law, and that you were substantially impaired to conform your conduct. . . . The Court finds that this mitigator does not exist." (R. 86:1907). The trial

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3 Spencer v. State, 615 So.2d 688 (Fla. 1993).

court also considered the following aspects of Busby's character, record, or background:

> And I considered your age at the time of the crime. The fact that you were loved by your family. The fact that you had emotional handicaps. That you were a witness to domestic violence. That you had a deprived childhood, a poor upbringing. That you had cooperated with law enforcement. That you were first incarcerated at a young age. That you had witnessed sexual abuse or had been sexually abused by your biological father. That there had been physical abuse by your biological father. That there had been abandonment by your family. That your mother had turned tricks by luring truckers on the CB radio in front of you. That you were placed in a position as prey to sexual predators in prison by your allegation. That foster parents once abandoned you. That you attempted suicide at the age of six, and was admitted into a hospital as a result of that act. I considered that you witnessed sexual abuse of your sisters by your father, that you witnessed sister on sister sexual abuse. I considered sexual abuse by your sister's boyfriend. That you suffered sexual abuse from your sister. Witnessed physical abuse by your father upon your mother. That you witnessed physical abuse by your father upon your mother. That you witnessed physical abuse by your father on your sisters. That you witnessed physical abuse by your mother on your sisters. The testimony of your mother's continued denial of abuse and attempts to blame you. That your mother's constant criticism and blame destroying your self esteem. Your claim of suffered institutional neglect while in the care of HRS. Your claim of suffered sexual harassment as a result of institutional neglect in the

Department of Corrections while in prison. I considered the trauma of deprivation of love and nurturing, particularly in the formative years. I considered your artistic ability, your learning disability, chaotic and violent childhood. The claims of sexual harassment in prison. Impaired mental capacity. Considered your good work habits, your loyal, devoted and kindness to your adopted father, who has been with you throughout these proceedings. I considered that you were small in stature, and your claim that this led to inmates attempting to prey upon you sexually. I considered the heartache and sadness of your life, the voluntary confession in this case. The claim that the co-defendant caused the death of the victim. Your claim, or the Defense claim, that you are a follower. Your claim of poor judgment and impulsive behavior. Your claim of low self esteem. Your feelings of being persecuted, exploited, and resulting in mistrust. I considered your prior suffering creating stress that led to offense that was committed for emotional reasons. Your claim that you didn't have any true childhood friends. Your claim that you were dominated by the co-defendant. I further considered your claim that you were unable to formulate a clear victim/offender identity, your claim that the abuse in your life was not reported early to authorities. The claim that your mother didn't believe your claim of abuse. And consideration of your poor access to information about what happened to you throughout your development. Considered the fact that you ultimately confessed in your first homicide case. Considered your claim of remorse about the murders, the two murders in the first homicide case. Considered your cooperation with law enforcement in your first homicide case. Considered your

cooperation in the investigation of the homicide of Elton Ard. And considered your feelings of being persecuted and exploited resulting in mistrust of others.

* * * * *

The Court finds that many of the mitigating factors set forth by the defense were repetition and were the same argument presented in different lights, but the Court considers that the mitigators are each separate and distinct and were treated as such, and considered as such by the Court.

All such mitigators taken together should be afforded, and the Court only affords moderate weight, and finds that they do not outweigh any aggravating factor.

The Court considered any other circumstances of the offense. Certain circumstances that were considered as they related to the existence or non-existence of all these mitigators that I have discussed, and the Court finds that there are no additional circumstances of the offense which would serve as mitigators.

The Court further finds that assuming that each and every one of the above discussed mitigating circumstances are found to exist and that none of them is given more than slight weight.

(R. 86:1908-1911).

As was submitted to the jury, the trial court found the following statutory aggravating circumstances:

As to the existence of aggravating circumstances the first aggravator the Court considered was that the crime for which you, Mr. Busby, are to be sentenced, was committed while you were under a previous conviction for a felony, and while you were under a sentence of imprisonment.

You've been previously convicted of two counts of first degree murder, and you're now serving two consecutive life sentences. This aggravating circumstance was established by the evidence beyond a reasonable doubt.

The second aggravator the Court considered, Mr. Busby, that you were previously convicted of a felony involving the use or threat of violence to some person. Having been previously convicted of two counts of first degree murder, this aggravating circumstance was established beyond a reasonable doubt.

Thirdly, the crime for which you, Mr. Busby, are to be sentenced, that aggravator was that it was especially heinous, atrocious and cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious and cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

The victim pleaded with you to stop, offering you $45.00.

You intentionally tried to inflict pain on Mr. Ard.

Ard suffered. You and Globe gloated about how Ard had to be choked a second time because he was still making gurgling noises, struggling for that last breath of life. You and Globe took the second garrote, tied it around Ard's neck, in your words, real, real, real tight. And then the two of you tied another knot and walked away.

The victim did not die immediately.

The testimony indicated you enjoyed killing the victim. You laughed about it being a deadly game of twister.

You were at times indicated that you were sorry for the first two murders, "those first two people, those were all mistakes, but this son of a --- (Ard) was a pleasure."

From the medical examiner's testimony, and the photographic evidence of the scratch marks on the neck, the victim attempted to release the strictures around his neck in an effort to breath, however he was unsuccessful in his attempt and died due to strangulation.

By your admission, the victim struggled in an attempt to save himself.

Your taped statements indicated that you enjoyed the victim's suffering in that you laughed while describing the attack.

The activity to which you admitted, either on tape or in written statements are as follows:

Extremely wicked, shockingly evil, outrageously wicked and vile.

The activity to which you admitted was designed to inflict a high degree of pain, with utter indifference to the suffering of the victim.

The killing of inmate Elton Ard was accompanied by acts that show the crime was conscienceless and pitiless and was unnecessarily torturous. And the Court finds that that aggravating circumstance was proved beyond a reasonable doubt.

The next and last aggravator the Court considered was that the crime for which you're to be sentenced was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification.

Cold means that the murder was a product of calm and cool reflection. Calculated means having a careful plan or a prearranged design to commit murder. A killing is premeditated if it occurs after you consciously decide to kill. However, in order for this aggravating circumstance to apply in this case a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

By your written and taped statements you had been contemplating the murder by ligature strangulation of an inmate or a correctional officer for months before Mr. Ard's death.

The evidence indicated you thought long and hard about it.

You got involved with punks, scoping out someone that would be loyal to you and help you kill someone.

You made a list of people that you wanted to kill, and Mr. Ard was on that list.

By your written and taped statements you decided to kill inmate Elton Ard more than 24 hours before the actual killing.

By your written and taped statements you told Globe to prefabricate garrotes which you intended to strangle inmate Elton Ard with.

By your written and taped statements you then attempted the strangulation of Elton Ard on at least three occasions before being able to carry it out as you had pre-planned.

By your written and tape recorded statements you and Globe strangled the victim for an extended period of time.

By your written and tape recorded statements, after a period of strangulation you both released the victim, then checked his vital signs to make sure the victim was dead.

By your written and tape recorded statements, after believing that you possibly detected vital signs you then applied the second garrote to the victim and sat back to smoke a cigarette and watch inmate Ard die.

You described how Ard must have struggled a good ten, fifteen minutes before he died.

The killing of Inmate Elton Ard was cold as defined by statute and court decisions.

The killing of Inmate Elton Ard was calculated as defined by statute and court decisions.

The killing of Inmate Elton Ard was premeditated as defined by statutes and court decision.

As to the issue of a pretense of moral or legal justification, which is any claim of justification or excuse, though insufficient to reduce the degree of murder, nevertheless, results in cold, calculated or premeditated nature of the murder. As justification or excuse for the killing of Elton Ard, you, by written and taped statements have offered the following.

That you were sexually harassed, and as a result of this sexual harassment Elton Ard deserved to die.

The Court finds this does not constitute a pretense of moral or legal justification for murder.

> The murder was committed as a political statement to highlight the unfair treatment of prisoners in the Florida Department of Corrections.
>
> The Court finds this does not constitute a pretense of moral or legal justification for the killing.
>
> You asserted that the murder was committed in retaliation for verbal insults Inmate Ard made to you.
>
> This does not constitute a pretense of moral or legal justification for murder.
>
> The Court finds beyond all reasonable doubt that the killing of Inmate Elton Ard was cold, calculated and premeditated, without any moral or legal justification.

(R. 86:1897-1903). Each of the aggravators was accorded great weight (R. 86:1912-1914).

The trial court found that each statutory aggravating circumstance, standing alone, was sufficient to outweigh any and all mitigating evidence (R. 86:1912-1913).

The trial court further stated that it agreed "with the eleven to one recommendation of the Jury, and finds that the facts suggests that a sentence of death are so clear and convincing that virtually no reasonable person could differ." (R. 86:1914). Busby was thereupon sentenced to death (R. 86:1914-1915).

Direct Appeal

Busby filed his notice of appeal on June 17, 2002, and now raises the following thirteen issues on direct appeal:

(1) "The court erred in refusing to grant Busby's cause challenges to prospective juror Kim Lapan, a former guard of death row prisoners and one who had a bias against them, which forced him to use a peremptory challenge to keep him off his jury, a violation of his Fifth, Sixth, and Fourteenth Amendment rights." Initial Brief Of Appellant (hereinafter "App.Br."), at 19;

(2) "The court erred in excluding the testimony of Martha Jobson, a social worker, who would have testified that Busby suffered from post-traumatic stress disorder, where such evidence would have supported and justified a defense of self-defense, a violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution." App.Br. at 28;

(3) "The court erred in allowing State Attorney Investigator Lisa Long to testify that she saw Busby make some hand gestures during the testimony of Charles Globe, and it also erred in allowing the State to read, as substantive evidence of guilt, the testimony of Andrew Busby when he took the stand after Long only to explain the gestures, a violation of his Fifth, Sixth, and Fourteenth Amendment rights." App.Br. at 43;

(4) "The court erred in refusing to give Busby his due process right to present his defense in the way he chose when it refused to let his co-defendant, Charles Globe, testify before the jury live and in person, but insisted he do so only by videotape, a violation of Busby's Fifth, Sixth, and Fourteenth Amendment rights." App.Br. at 50;

(5) "The court erred in denying Busby's motion to suppress statements he made to law enforcement officers after he told them he did not want to talk with them, a violation of his Fifth and Fourteenth Amendment rights under the United States Constitution, and his rights under Article I, Section IX of the Florida Constitution." App.Br. at 59;

(6) "The court erred in admitting, as Williams[ ] Rule evidence that Busby wanted to kill a Roberto Rosa and Alphonso Palmer, a violation of the defendant's constitutionally guaranteed right to a fair trial." App.Br. at 66 (internal footnote with citation omitted);

(7) "The court erred in admitting a transcript of Busby's July 7, 2000 confession rather than the original audiotape of that statement, a violation of the defendant's constitutional rights to a fair trial." App.Br. at 73;

(8) "The court erred in finding Busby murdered Elton Ard in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, a violation of the defendant's Eighth Amendment rights." App.Br. at 79;

(9) "The court erred in refusing to admit several exhibits Busby offered during the penalty phase portion of his trial, which would have helped the jury understand why he had been diagnosed as suffering from post traumatic stress disorder, a violation of his Eighth and Fourteenth Amendment rights." App.Br. at 83;

(10) "The court erred in admitting a letter Busby ostensibly wrote to Charles Globe because its prejudicial value substantially outweighed its limited relevance, a violation of the defendant's due process right to a fair trial." App.Br. at 86;

(11) "The court erred in sentencing Busby to death because Section 921.141 Florida Statutes unconstitutionally allowed the trial court to sentence him to do so without, among other things, a unanimous death recommendation from the jury." App.Br. at 89;

(12) "The court erred in allowing the State to present evidence beyond the fact that Busby had two prior first degree murder convictions in support of the prior violent felony aggravating factor, a violation of the Fifth, Sixth, and Fourteenth Amendments." App.Br. at 93;

(13) "The trial court erred in repeatedly instructing the jury that their recommendation was just that, a recommendation, a violation of Busby's Sixth, Eighth, and Fourteenth Amendment rights." App.Br. at 95.

In addition, this Court has an independent duty to review the sufficiency of the evidence of the first degree murder conviction and the proportionality of the sentence. See Bell v. State, 841 So.2d 329, 336-337 (Fla. 2002) (citing cases); Knight v. State, 746 So.2d 423, 437 (Fla. 1998) (citing constitutional provision and cases), cert. denied, 528 U.S. 990 (1999). The State addresses these matters under Issue XIV in its brief.

SUMMARY OF THE ARGUMENT

I.

The trial court did not abuse its discretion in denying Appellant's motion to strike venireman Lapan for cause. And because venireman Lapan did not serve on the jury, and Appellant failed to make any showing that the jury was biased, Busby failed to demonstrate that he was denied his right to an impartial jury.

II.

The trial court did not abuse its discretion in rejecting Appellant's proffer of mental health expert testimony in furtherance of his claim of self-defense. Busby failed to establish that the evidence was relevant, as there was no showing that he murdered Ard in response to any conduct of the victim that put Appellant in imminent fear for his physical safety.

III.

The trial court did not err in admitting the testimony of an investigator from the State Attorney's Office, who testified that she observed Appellant make hand motions to his co-defendant when the co-defendant testified as to Busby's lack of involvement in the murder. The evidence was properly adduced in rebuttal to Globe's testimony as impeachment evidence. In addition, any objection was

abandoned as to the admissibility of the investigator's testimony, as no argument is presented on appeal. Busby's testimony was also properly admitted, as he did not have a constitutional right to make statements to his co-defendant while he was testifying, and thus his decision to testify in furtherance of his argument that Investigator Long's testimony should be excluded did not involve the invocation of one constitutional right at the expense of the loss of another. Finally, even if admission of the evidence was error, it was harmless beyond a reasonable doubt.

IV.

Appellant should not be heard to complain as to the manner in which his co-defendant's testimony was admitted, in that the defense expressly requested that Globe testify via videotape rather than live before the jury.

V.

Appellant's request to remain silent did not create a per se prohibition precluding further questioning by the authorities. The fact that approximately seven hours elapsed before Appellant was again asked if he wished to make a statement established that his invocation of his right to remain silent was scrupulously honored and the July 3, 2000 statement was properly admitted. Appellant's statement given on July 7, 2002 was also properly admitted. Because the earlier statement was not illegally obtained, admission of the latter, in this case as rebuttal evidence, was not unconstitutional. Further, Appellant was properly advised of his Miranda rights and his waiver was knowing, intelligent, and voluntary. Finally, even if admission of either statement constituted error, the verdict could not have been affected by the error and thus any such error was harmless beyond a reasonable doubt.

VI.

The admission of evidence, from Appellant's July 3, 2000 statement, that he and Globe had targeted and attempted to lure other inmates to Busby's cell to kill them in the manner in which Ard was murdered, was properly admitted as Williams rule

evidence. In addition, the evidence was inextricably intertwined with the facts of the crime charged. Finally, even if deemed error, admission of the evidence was harmless.

VII.

The trial court properly admitted into evidence during the penalty-phase of trial the transcript of Appellant's July 7, 2000 statement under § 921.141(1), Fla. Stat., and as secondary evidence, where the law enforcement officer that interviewed Appellant testified that the transcript fairly and accurately depicted his recollection of that interview.

VIII.

The trial court did not erroneously find the cold, calculated, and premeditated aggravating circumstance. The evidence supported the elements of the aggravator beyond a reasonable doubt. Busby's contention that the murder was committed under the pretense of moral or legal justification is procedurally barred as now raised on appeal, as Busby argued below on the issue that he killed to send a message but now contends that he committed the murder in self-defense. And even if properly before the Court, the record clearly refutes Busby's claim beyond a reasonable doubt.

IX.

The trial court did not abuse its discretion in excluding during the penalty-phase hearsay evidence proffered by the defense that the State did not have a fair opportunity to rebut. And even if erroneous, Appellant was not prejudiced because the evidence, including two videotapes of Busby role-playing and a letter about his relationship with his mother, was cumulative to evidence that was presented by the defense in mitigation.

X.

Pursuant to § 921.141(1), the trial court properly admitted into evidence during the penalty-phase a letter identified as having been written by Appellant to his co-defendant. The letter was probative of the extent of Busby's involvement in the commission

of the murder. In addition, Busby defaulted upon his claim that the prejudicial effect of portions of the letter outweighed its probative value, having failed to request that the trial court redact those portions. Finally, even if the letter should not have been admitted, any such error was harmless beyond a reasonable doubt.

XI.

Appellant is not entitled to relief upon his claim that Ring v. Arizona, 536 U.S. 584 (2002) requires that the jury recommendation of death be unanimous. This Court has rejected such claims post-Ring. In addition, two of the aggravating circumstances were prior violent felony convictions, which were the result of unanimous jury verdicts and fall outside of Ring.

XII.

In Cox v. State, 819 So.2d 705 (Fla. 2002), cert. denied, 123 S.Ct. 889 (2003), this Court upheld the admission of facts underlying the prior violent felony convictions of which the State relied as statutory aggravating circumstances. In asking the Court to reconsider Cox, Busby contends that the probative value of the evidence was outweighed by its prejudicial effect. The evidence, however, was Busby's own confession to the murders, and was properly admitted under § 921.141(1).

XIII.

The Florida Standard Jury Instructions do not contravene Caldwell v. Mississippi, 472 U.S. 320 (1985). The instructions properly informed the jury of its role under Florida law. In addition, at no time was the jury's sense of responsibility diminished in respect to its role in respect to its consideration of the aggravating circumstances.

XIV.

The evidence overwhelmingly supports Busby's conviction upon one count of first degree premeditated murder, where Busby had targeted a number of inmates and corrections officers and ultimately decided to kill the actual victim in this case, directed his

co-defendant to make a ligature in order to strangle their victim, and sought to kill the victim for three days preceding the murder. In addition, the sentence of death imposed in this case is proportionate to others approved by this Court. The record supports the finding of the four aggravating factors submitted and the trial court appropriately considered and weighed the mitigating factors presented.

ARGUMENTS

I.

APPELLANT'S RIGHT TO AN IMPARTIAL JURY WAS NOT VIOLATED UPON THE TRIAL COURT'S REJECTION OF BUSBY'S MOTION TO STRIKE FOR CAUSE VENIREMAN KIM LAPAN AND DENIAL OF APPELLANT'S REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES, WHERE APPELLANT FAILED TO MAKE ANY SHOWING THAT THE VENIREMEN THAT HE WOULD OTHERWISE HAVE REMOVED WERE UNQUALIFIED OR THAT THE JURY THAT DID SIT WAS NOT IMPARTIAL.

Busby contends under Issue I that the trial court erroneously refused to strike for cause venireman Kim Lapan, which necessitated that Busby exercise all of his peremptory challenges. App.Br. at 19. At trial Busby stated that he would have removed veniremen Winston and Liebel had the trial court granted him extra peremptory challenges (R. 75:744-745). Because Appellant fails to make any showing, however, that the venirepersons that did serve on the jury were biased or otherwise unqualified, he is not entitled to relief.

First, while conceding that "this Court reviews these types of issues for an abuse of discretion," citing Pentecost v. State, 545 So.2d 861 (Fla. 1989), App.Br. at 19, Appellant asserts that his "persistence in satisfying every demand this Court has required to preserve his objection to Lapan should prompt it to give much

closer scrutiny of what the trial court did than it might do for other alleged trial errors." App.Br. at 19-20. Busby cites no authority for the application of a different standard of review based upon his compliance with the prerequisite for preservation of error as would be expected of any defendant seeking to litigate on appeal the propriety of the trial court's ruling on a motion to strike for cause, and there is no reason for this Court to deviate from the abuse of discretion standard.

Without more, the governing standard is whether the trial court abused its discretion in denying Busby's strike for cause to venireman Lapan.[4] See, e.g., Reaves v. State, 639 So.2d 1, 5 (Fla.), cert. denied, 513 U.S. 990 (1994); Valdes v. State, 626 So.2d 1316, 1321 (Fla. 1993), cert. denied, 512 U.S. 1227 (1994). Here, however, Busby removed venireman Lapan with a peremptory challenge. In Ross v. Oklahoma, 487 U.S. 81 (1988), the United States Supreme Court unequivocally "reject[ed] the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." Id. at 88. The rationale underlying the Supreme Court's decision is that peremptory challenges are a means of obtaining an impartial jury; the peremptory challenges themselves are not of constitutional dimension. Id. Similarly, Ross rejected the argument that a deprivation of due process results wherein a defendant exercises a peremptory challenge to remove a venireperson he otherwise believes should have been struck for cause. Id. at 89; see also Chandler v. Moore, 240 F.3d 907, 917 (11th Cir.), cert. denied, 534 U.S. 1057 (2001); Heath v. Jones, 941 F.2d 1126, 1132-1133 (11th

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4 The record precludes such a finding in this case, as venireman Lapan, although a former prison guard, was qualified to serve on the jury. He unequivocally stated that he would follow the court's instructions, specifically agreeing that he could impose a life sentence if the aggravating circumstances were not sufficient or if the mitigating circumstances were outweighed by the evidence in aggravation (R. 72:381-382, 384). And notwithstanding venireman Lapan's strong feelings about the death penalty, he was nonetheless qualified to serve because he indicated that he could abide by the trial court's instructions. Johnson v. State, 660 So.2d 637, 644 (Fla. 1995).

Cir. 1991), cert. denied, 502 U.S. 1077 (1992). Thus because peremptory challenges are not required by the Constitution and are a creature of state statutory law, "the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law provides." Ross, 487 U.S. at 89. To hold that petitioner may establish constitutional error absent a demonstration that the empaneled jury was not impartial based upon the use of a peremptory challenge to remove a venireperson who he contends should have been removed for cause would constitute creation of a new rule of constitutional law. See United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000) ("We hold . . . that if the defendant elects to cure such an error by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right.").

"Under federal law [then], the defendant must show that a biased juror was seated." Trotter v. State, 576 So.2d 691, 692-693 (Fla. 1990); see also Martinez-Salazar, 528 U.S. at 316 ("Nor did the District Court's ruling result in the seating of any juror who should have been dismissed for cause. . . . [T]hat circumstance would require reversal.") (internal citation omitted). "Under Florida law, 'to show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted.'" Id. at 693 (quoting Pentecost, 545 So.2d at 863 n.1). Busby makes no attempt to demonstrate that the jury that did sit at his trial was not impartial or that the veniremen that he would have struck with additional peremptory challenges were unqualified

"The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." Kearse v. State, 770 So.2d 1119, 1127 (Fla. 2000) (citing Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984)), cert. denied, 532 U.S. 945 (2001). In Bryant v. State, 601 So.2d 529

(Fla. 1992), this Court set forth the applicable standard for determining whether a venireman should be struck for cause:

> The standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment was restated by the United States Supreme Court in *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985), in which that Court stated:
>
> > That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that, in addition to dispensing with Witherspoon's reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity."
>
> *Id.* at 424 (footnote omitted) (quoting *Adams v. Texas*, 448 U.S. 38, 65 L. Ed. 2d 581, 100 S. Ct. 2521 (1980)).

Id. at 532.

Review of the record pertaining to the veniremen that Appellant would have exercised peremptory challenges had he been accorded additional challenges by the trial court refutes any notion that the veniremen were not qualified.

Regarding venireman Winston, while his son worked at Union Correctional Institution (R. 73:479), he said he could vote for life if the aggravating circumstances were insufficient (R. 73:475)

or if the mitigating circumstances outweighed the aggravators (R. 73:475-476). In other words, venireman Winston averred that he could follow the court's instructions. Busby failed to present any evidence of bias. Busby did not move to strike venireman Winston for cause (R. 73:480). The fact that Winston's son worked for a correctional institution did not give rise to a per se disqualification to sit on the jury. Cf. State v. Williams, 465 So.2d 1229, 1230 (Fla. 1985) (citing Lusk, 446 So.2d at 1041 and Morgan v. State, 415 So.2d 6 (Fla), cert. denied, 459 U.S. 1055 (1982) for the proposition "that state prison employees are not automatically disqualified from jury service" and holding that the trial judge did not abuse its discretion in refusing to excuse for cause the correctional officers). Regarding venireman Liebel, while her son worked at Columbia Correctional Institution, she similarly stated that she would only consider aggravating evidence that the court instructed upon (R. 72:393), and that she could vote for life if the aggravating circumstances were insufficient or if the mitigation outweighed the evidence in aggravation (R. 72:394). As was the case with venireman Winston, venireman Liebel could follow the court's instructions. Busby failed to present any evidence of bias, and did not move to strike Ms. Liebel for cause (R. 72:397).

Because veniremen Liebel and Winston were qualified to sit as jurors and Busby failed to make any showing otherwise, Issue I should be denied. Penn v. State, 574 So.2d 1079, 1081 (Fla. 1991); Rollins v. State, 148 So.2d 274, 276 (Fla. 1963).

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING BUSBY'S POST-TRAUMATIC STRESS DISORDER EXPERT TESTIMONY DURING THE GUILT-PHASE OF TRIAL IN FURTHERANCE OF HIS CLAIM OF SELF-DEFENSE, AS APPELLANT FAILED TO ESTABLISH THAT THE VICTIM ENGAGED IN ANY CONDUCT THAT WOULD HAVE REASONABLY PLACED APPELLANT IN IMMINENT DANGER.

Appellant contends that the trial court erroneously excluded the testimony of Martha "Nan" Jobson regarding Busby suffering from Post-Traumatic Stress Disorder in furtherance of his defense of self-defense. App.Br. at 28-30.

Busby goes into detail regarding Post-Traumatic Stress Disorder and cites various publications not presented below, see App.Br. at 33-39, and contends that "evidence that Busby suffered from PTSD was relevant to explain why he believed he was in imminent danger of being raped, tortured, or killed." App.Br. at 36. Nonetheless, he neglects to acknowledge or address the fact that he failed to cite, let alone establish, any overt act by the victim, Elton Ard, before the trial court that would give rise to an imminent threat of harm by Ard to Busby -- i.e., that the evidence was relevant to a claim of self-defense. While evidence of Post-Traumatic Stress Disorder is generally admissible as state-of-mind evidence to support a claim of self-defense, State v. Mizell, 773 So.2d 618, 620-621 (Fla. 2000), a criminal defendant must still establish that the evidence is relevant to the claim of self-defense.

"Under Florida statutory and common law, a person may use deadly force in self-defense if he or she reasonably believes that deadly force is necessary to prevent imminent death or great bodily harm." Weiand v. State, 732 So.2d 1044, 1049 (Fla. 1999). In discussing the admissibility of evidence in support of a claim of self-defense, the First District Court of Appeals stated that

> [w]here there is even the slightest evidence of *an overt act by the victim* which may be reasonably regarded as placing the accused apparently in *imminent* danger of losing his life or sustaining great bodily harm, all doubts as to the admissibility of evidence bearing on his theory of self-defense must be resolved in favor of the accused.

Warren v. State, 577 So.2d 682, 684 (Fla. 1st DCA 1991) (emphasis added). In determining whether the proffered evidence is relevant,

an objective standard "must be applied to *the facts and circumstances as they appeared at the time of the altercation to the one acting in self defense.*" Toledo v. State, 452 So.2d 661, 662-663 (Fla. 3rd DCA 1984) (internal citation and quotation marks omitted; emphasis in original).

Here, Busby made no such showing of any conduct on the part of the victim that would reasonably have placed Appellant in imminent danger. Instead, he relied upon generalizations about how someone with his abusive background would, in "a prison setting and been the subject of constant sexual harassment and possibly hearing the threat of being raped or being forced to submit to someone sexually" (R. 78:1105-1106), have been "triggered" and "interpret that possibility as an imminent threat." (R. 78:1106). Indeed, Busby's "Memorandum In Support Of Self Defense Evidence" made no mention of any threat by Ard, but stated that Appellant "was sexually harassed on a regular ongoing basis [and] [a]s a result of the sexual harassment, Mr. Busby was in fear of another inmate attempting to rape him." (R. 16:3099). Contrary to providing a basis for the defense, Busby's claim is refuted by the testimony of his expert that the victim's act in refusing to have oral sex with Appellant, immediately preceding the murder, would not have triggered the response that he was in imminent danger (R. 78:1109). In addition, as intricately examined in the State's "Reply Brief To 'Self Defense' Memorandum" (R. 17:3219-3222), the record is replete with instances refuting Busby's general allegation that he was in "imminent danger."

The trial court excluded the expert testimony as follows:

> The Court recognizing the time having passed and the -- this defendant being present with a person larger than the two other persons and the two persons present, if the testimony is believed, having no trouble overpowering the third, the Court finds the trigger testimony is not sufficient to outweigh the facts before the Court, and the Court

will deny the post traumatic stress disorder, self-defense issue as presented to this point.

(R. 78:1113). Based upon the foregoing, Issue II should be denied.

III.
THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF THE INVESTIGATOR FOR THE STATE ATTORNEY'S OFFICE AND APPELLANT'S PROFFER TO EXCLUDE THAT TESTIMONY.

As discussed in Issue IV, Appellant's co-defendant testified via videotape upon the wishes of both Busby and defense counsel. See infra, at 45-50. When the videotape of Globe's testimony was made, an investigator for the State Attorney's Office, Lisa Long, observed Busby make a series of five signing motions to Globe (R. 81:1391). After Globe's testimony was recorded, a lunch recess was taken (R. 79:1199-1200). At that time, the prosecutor, who did not observe Busby's hand signaling himself, learned of it (R. 79:1219). After the recess, when Busby told the court that he wanted the tape played, the prosecutor said that it would be subject to rebuttal testimony and asked that the defendant be advised accordingly (R. 79:1210). Another issue was then addressed, and thereafter the prosecutor advised the trial court of what his investigator had observed and of his intention to "call her to the witness stand to testify to that." (R. 79:1219). The State then gave notice of Long's testimony by proffering it outside the jury's presence, the extent of which was that she observed Busby signing to Globe when Globe was testifying, that she saw five hand motions, and that she could not remember at what point in Globe's testimony that she saw the hand motions (R. 79:1221-1222). Busby then took the stand, also outside of the jury's presence (R. 79:1222), and testified concerning his signaling Globe while he was testifying (R. 79:1223-1225). The court ruled Long's testimony admissible (R. 81:1335) and she subsequently testified before the jury (R. 81:1389-1392). After finding Busby's testimony admissible (R. 81:1340, 1392), Busby's testimony was read to the jury, as follows:

THE CLERK: "Andrew Busby, a witness having been duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

The Court: Thank you. Please be seated.

Mr. Ellis [defense counsel], Question: Tell us your name, sir.

Answer: Andrew Busby.

Question: Were you present when Mr. Globe testified?

Answer: Yes, I was.

Question: Did you at any point communicate by sign language of some type?

Answer: Yes, I did.

Question: In the direction of Mr. Globe?

Answer: Yes, I did.

Question: Would you tell his Honor, the Judge, what, if anything you said?

Answer: Called him a liar.

Question: Did you say anything else to him?

Answer: No, I did not.

MR. ELLIS: No other questions.

Mr. Dekle [prosecutor], Question: What was he saying when you called him a liar?

Answer: That our roles -- about the roles in the killing.

Question: About the roles in the what?

Answer: In the killing.

Question: In other words, you were telling him that he was a liar when he said that he acted alone?

Answer: Yes."

(R. 81:1393-1394).

Appellant contends that "[a]llowing Ms. Long to testify was error, but much more significantly, the court erred in allowing the State to produce Busby's testimony, and it abused its discretion in doing so . . . ." App.Br. at 45.

Regarding the testimony of Investigator Long, the evidence was properly adduced in rebuttal to Globe's testimony as impeachment evidence. Notwithstanding, Appellant fails to present any argument in the argument portion of his brief as to why her testimony was not admissible. See App.Br. at 43-49. The claim as to Long's testimony is, therefore, abandoned. Marshall v. State, ___ So.2d ___, 2003 Fla. LEXIS 1056 *47 (Fla. June 12, 2003); Gore v. State, ___ So.2d ___, 28 Fla. L. Weekly S334, S338 n.9 (Fla. Apr. 17, 2003).

Regarding Busby's testimony, to the extent that Appellant cites the trial court's statement that the jury was not going to hear

the testimony, see App.Br. at 44, the trial court did not make that statement until after the portion of Busby's testimony that was read into the record. Thus any contention that Busby relied upon the trial court's assertion would be unfounded as occurring after his admitted testimony (compare R. 79:1223-1225 with R. 81:1393-1394).

Before the trial court, Busby opposed admission of his testimony made outside of the jury's presence on the basis that it was given in a situation no different than a hearing on a motion to suppress (R. 80:1316-1317).

In Simmons v. United States, 390 U.S. 377 (1968), the United States Supreme Court addressed the problem of whether the surrender of one constitutional right for the exercise of another imposed an impermissible penalty. Id. at 394. Here, unlike the situation in Simmons and other cases cited by Appellant, App.Br. at 45-48, Busby sought to preclude admission of testimony regarding actions that he voluntarily took in open court, but for which he had no constitutional right. Thus unlike a claim involving an alleged unreasonable search or seizure or use of a statement taken in violation of the privilege against self-incrimination, Busby's use of sign language to a defense witness did not implicate a matter for which he had a constitutional right. For this reason, the cases relied upon by Busby are inapposite. That Busby decided to testify to attempt to have testimony concerning his in-court conduct excluded -- i.e., an evidentiary matter -- does not raise that underlying claim to constitutional dimension. Accordingly, Busby's testimony was properly admitted.

Nor is there any merit to Busby's contention that his testimony was inadmissible because he had a "Fourteenth Amendment due process right to present a defense, to object to and present evidence against the State's proof." App.Br. at 47. In addition to the fact that this claim is procedurally barred as it was not presented to the trial court, the situation is not any different than when a defendant elects to take the stand to testify in opposition to the State's evidence. Finally, the United States Supreme Court

rejected an analogous argument in McGautha v. California, 402 U.S. 183 (1971), where the defendant contended that under the Fourteenth Amendment he was entitled to a bifurcated trial in order to protect his right to be heard on the issue of punishment. Id. at 210-213.

Moreover, even if the trial court erred in admitting the evidence, the error was harmless. United States v. Pena-Corea, 165 F.3d 819, 822 (11th Cir. 1999) ("We need not reach the question of whether *Simmons*' rationale extends to a situation like the one here--where the defendant was not attempting to vindicate a constitutional right--because the evidence of [petitioner's] guilt was overwhelming. Thus, the error, if any, was harmless."). Here, evidence of Busby's active participation in the premeditated murder included his letter to his stepfather and the statements made on July 3 and July 7, 2000. See also infra, at 92-93.

Appellant has failed to establish that he is entitled to relief under Issue III and thus it should be denied accordingly.

IV.

THE TRIAL COURT DID NOT ERR IN ADMITTING CO-DEFENDANT GLOBE'S TESTIMONY VIA VIDEOTAPE, AS REQUESTED BY THE DEFENSE.

Under Issue IV, Busby contends that

> THE COURT ERRED IN REFUSING TO GIVE BUSBY HIS DUE PROCESS RIGHT TO PRESENT HIS DEFENSE *IN THE WAY HE CHOSE* WHEN IT REFUSED TO LET HIS CO-DEFENDANT, CHARLES GLOBE, TESTIFY BEFORE THE JURY LIVE AND IN PERSON, BUT INSISTED HE DO SO ONLY BY VIDEOTAPE, A VIOLATION OF BUSBY'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

App.Br. 50 (emphasis added). According to Busby, "[t]he question presented here asks to what extent can the trial court control or dictate how he presents that defense." App.Br. at 51.

Unfortunately for Appellant, the record reflects that it was the defense and Busby himself that wanted Globe's testimony presented via videotape rather than live. While Appellant properly sets forth the facts concerning the manner in which the idea to videotape Globe's testimony arose, he neglects that most crucial fact.

The facts underlying the issue are as follows:

Busby first disagreed with counsels' decision to present the testimony of co-defendant Globe. The defense made a record of that disagreement for the trial court (R. 76:833-840). The issue was later take up on the record again (R. 79:12124-1133). At that time, based upon the belief that Globe was a "loose cannon" and "there will be absolutely no repercussions because he is awaiting a death sentence" (R. 79:1124), and that Busby did not want Globe to testify while his attorneys did as a tactical matter (R. 79:1127-1128), the prosecutor suggested that Globe's testimony be videotaped (R. 79:1129). Defense counsel objected to the State's suggestion, stating that he wanted "Mr. Globe here." (R. 79:1129-1131). The Court overruled the objection and directed that Globe's testimony be videotaped (R. 79:1131-1133). Globe then testified outside of the presence of the jury, which was videotaped (R. 79: 1135-1198). Thereafter, Busby persisted in his position that he did not want Globe to testify (R. 79:1198-1199), while counsel still wanted to present his testimony (R. 79:1199). The court then recessed for lunch, having decided to take up the issue after the recess (R. 79:1199-1200). Upon returning from the lunch recess, the following side bar conference was had:

> THE COURT: We are on the record. The Court -- I want to inform you, Mr. Busby, that the legal research of both the State, the Defense and the

Court is that you have the absolute right to choose whether to have a witness called or not in the defense.

MR. DOSS: Judge, I take myself out of that equation because I still maintain that it's our choice.

THE COURT: Okay. The Judge is ruling that it's your choice. Okay. You can make the choice. You have experienced, competent attorneys who disagree with you and have given you their best level advice, but I am ruling it's your choice.

MR. DOSS: Judge, I am asking for an opportunity one more time to speak with Mr. Busby about this issue.

MR. BUSBY: I was going to ask the same thing.

MR. DOSS: Because we had conferred over the break with a different understanding.

THE COURT: I understand, but knowing that is going to be the ruling of the Court, I will allow you time to make an informed decision.

MR. DOSS: Thank you, sir.

MR. BUSBY: Thank you.

(The Defendant and Counsel confer off the record.)

THE COURT: *Mr. Dekle, there is no more argument on video versus live whenever that time comes, is there?*

MR. DEKLE: *Yes, sir, there may be some.*

THE COURT: All right. It's time for it.

(A side bar conference was held with defendant present as follows:)

THE COURT: Does the Defense have an answer on my earlier ruling about the defendant having the right to make the choice? Has he made a choice?

THE DEFENDANT: Yes, sir.

THE COURT: And what is that?

THE DEFENDANT: *Play the tape.* I don't want – I really don't want to agree with his testimony at all, *but I would rather go with the tape than him doing it live.*

THE COURT: Well, it's your choice of whether we have it at all or not. What is your choice about having anything?

THE DEFENDANT: *Going with the tape.*

THE COURT: Then the State is going to argue --

MR. DEKLE: There is kind of an equivocable issue here that I would like to straightened it.

THE COURT: It will be. I will do that.

MR. DEKLE: The question I would like to have Mr. Busby asked is: *Does he understand that if he says no, the tape does not get played, nothing goes before the jury. All he has to do is say no and it don't happen.*

THE COURT: *Do you understand that, Mr. Busby?*

THE DEFENDANT: *I understand that.*

THE COURT: All right. Do you want -- now is the State arguing for live or tape?

MR. DEKLE: The State would be content with the tape.

THE COURT: That is excellent.

Now, Mr. Busby, you have said yes you want the tape played?

THE DEFENDANT: *Yes, sir.*

THE COURT: *And you know that you have the right not to play the tape?*

THE DEFENDANT: *Yes, sir.*

THE COURT: *Do you agree with your attorneys on that issue?*

MR. BUSBY: *Yes, sir.*

THE COURT: *Your attorneys have advised you that it's best to play the tape, is that correct, than have this witness testify?*

MR. BUSBY: *Yes, sir.*

MR. DOSS: *I will confirm that, Judge.*

THE COURT: *And you agree, Mr. Ellis?*

MR. ELLIS: *Yes. And Mr. Busby has talked us into not -- to play it.* Conservatively Mr. Busby is an unpredictable personality --

MR. DOSS: Mr. Globe?

MR. ELLIS: I am sorry, Mr. Globe is an unpredictable personality.

THE COURT: *So you're listening to your Counsel and you want the tape played and you do not want the live witness Globe; is that correct?*

THE DEFENDANT: *Yes, sir.*

* * * * *

(R. 79:1206-1210) (emphasis added).

As the above colloquy establishes, it was Busby's decision to present Globe's testimony via the videotape. His change of mind now on appeal does not provide a basis for relief. Mansfield v. State, 758 So.2d 636, 643 (Fla. 2000) ("The defense, having invited the error, is precluded from complaining of it on appeal.") (citing Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983)), cert. denied, 532 U.S. 998 (2001); Goodwin v. State, 751 So.2d 537, 544 n.8 (Fla. 1999) ("Under the invited-error doctrine, a party may not make or

invite error at trial and then take advantage of the error on appeal."). Moreover, because Globe was Busby's witness, his reliance upon Confrontation Clause cases, in particular Harrell v. State, 709 So.2d 1364 (Fla.), cert. denied, 525 U.S. 903 (1998), App.Br. at 51-53, is misplaced. In Harrell, the State -- not the defendant -- had presented the testimony of the two victims via satellite transmission. Id. at 1367. "[T]he Confrontation Clause guarantees a criminal defendant the right *to physically confront accusers*, [although] this right is not absolute." Id. (emphasis added) (citing Maryland v. Craig, 497 U.S. 836, 849-851 (1990)).

Based upon the foregoing, Issue IV is without merit and should be denied.

V.

ADMISSION OF BUSBY'S STATEMENTS, PROVIDED ON JULY 3, 2000 AND JULY 7, 2000, DID NOT VIOLATE THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS AUTHORITIES SCRUPULOUSLY HONORED APPELLANT'S RIGHT TO REMAIN SILENT AND APPELLANT SUBSEQUENTLY WAIVED HIS MIRANDA RIGHTS.

Busby appeals from the admission of his statements made on July 3, 2000 and July 7, 2000.[5] Busby filed a motion to suppress the two statements (R. 11:2075-2078), which was denied following a suppression hearing (R. 13:2408). At trial Busby objected to the admission of the July 3rd statement (R. 78:1022-1023). The July 7th statement was not offered as substantive evidence during the guilt-phase of trial; rather, a witness present when the statement was made testified in rebuttal concerning aspects of the statement at guilt-phase (R. 81:1385-1388), and during the penalty-phase it was

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5 While Busby's suppression motion pertained to the statements made on July 3, July 7, and July 12, 2000 (R. 11:2075-2078), on appeal he does not address the admissibility of the July 12, 2000 statement, presumably because that statement did not pertain to the murder (R. 1:59) and was not presented to the jury.

presented in the form of a transcript, as the audiotape was not available (R. 82:1552). Busby's challenge to the manner in which the July 7th statement came in at the penalty-phase, upon a timely objection (R. 82:1553), is presented under Issue VII. App.Br. 66-70.

A. Admissibility of the Statements

The standard of review is as follows:

> Appellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendment and, by extension, article I, section 9 of the Florida Constitution.

Nelson v. State, ___ So.2d ___, 27 Fla. L. Weekly S797, S798 (Fla. Oct. 3, 2002) (quoting Connor v. State, 803 So.2d 598, 608 (Fla. 2001), cert. denied, 535 U.S. 1103 (2002)).

1. July 3, 2000 Statement

Busby contends that the law enforcement authorities failed to scrupulously honor his request to remain silent when FDLE Special Agent Ugliano told Busby he was from FDLE and asked whether Busby had requested FDLE, referring to the written message "Call FDLE" found in Busby's cell, approximately thirty seconds after the audiotape was turned off, after Busby said he did not want to talk about the murder (R. 67:65, R. 67:79). App.Br. at 63. Busby further contends that while he was advised of his constitutional rights prior to making the July 3rd statement, "he never said he wanted to waive them (62 R 12332), and in light of his invoking them earlier, the police should have done more than to

accept his silence as anything other than an acquiesence [sic] to the inevitable." App.Br. at 63.

The facts surrounding the two interviews on July 3rd are as follows:

On July 3, 2000, at 12:02 p.m., Inspector Schenck and Agent Ugliano attempted to interview Busby at CCI (R. 1:27). Busby was advised of his Miranda[6] rights and acknowledged that he understood them (R. 1:27). When asked "Would you like to ask . . . . answer a few questions, or make a statement," Busby answered "No." (R. 1:27). The interview was concluded, and at 12:04 p.m., the audiotape was turned off (R. 1:27). According to testimony adduced at the suppression hearing, however, it was established Agent Ugliano asked Busby "whether or not he had summoned the Florida Department of Law Enforcement, and then there was an exchange between" the two (R. 67:65). Inspector Schenck had no memory of what Busby's response was to the question or what was said thereafter (R. 67:66). Agent Ugliano testified at the suppression hearing that he "told Mr. Busby that I was -- I was from FDLE; that there was a sign in the cell asking for FDLE, and I was FDLE, and what did they -- what did they want." (R. 67:79). The record fails to reflect what Busby's response was and what additional exchange occurred (compare R. 67:65-66, 79-80, 87).

The second interview on July 3, 2000, was conducted at 7:32 p.m. (R. 1:110). Those present, in addition to Busby and Globe, included Inspector Schenck, Agent Ugliano, Agent Gode, Inspector Supervisor Dotson, and Inspector Rhoden (R. 1:110). Busby had made a telephone call to his father around 6:30 p.m., and was crying when he finished (R. 67:81). At that time Agent Ugliano was speaking with Globe, who said he would make a statement if Busby "was going to be allowed to make a statement with him." (R. 67:81). Agent Ugliano further testified that "Charles approached Andy and told him he was going to make a statement,

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6Miranda v. Arizona, 384 U.S. 436 (1966).

and he wanted Andy with him; and Andy said that he was also going to make a statement, and we took them to the room where they made a joint statement." (R. 67:81-82). After being advised of their rights, both Globe and Busby verbally acknowledged that they understood their rights (R. 1:110-111; see R. 67:71-72). Although Busby did not expressly answer the question whether or not he wished to answer questions or make a statement, he did volunteer answers throughout the statement (R. 1:113, 115-144, 147-153, 155-158).

Regarding whether his right to remain silent was scrupulously honored, Busby fails to acknowledge that any statement that he might have made in response to Agent Ugliano's question after the tape recorder was turned off, a question that was prompted by the actions of Busby and his co-defendant in writing "call FDLE" at the murder scene, was not admitted at trial. See Henry v. State, 574 So.2d 66, 70 (Fla. 1991). For that matter, the record of the suppression hearing does not even establish what Busby said to Agent Ugliano. Nor does the record establish that Agent Ugliano specifically asked Busby about the murder. Thus Agent Ugliano's isolated statement "did not delude [defendant] as to his 'true position, or . . . exert improper and undue influence over his mind.' . . . ." Peterka v. State, 640 So.2d 59, 67 (Fla. 1994) (internal citations omitted), cert. denied, 513 U.S. 1129 (1995). Accordingly, Busby's reliance upon Bowen v. State, 404 So.2d 145 (Fla. 2nd DCA 1981), is misplaced. In Bowen, the police continued to question the defendant about the burglary after he said he did not want to talk about it. Id. at 146. That did not occur here, where Agent Ugliano only asked whether Busby had sent for the FDLE.

In addition, Busby's actual statement made on July 3rd was not elicited until at least seven hours had passed from the time that he declined to speak with authorities, as the first interview occurred at 12:02 p.m. (See R. 10:2076) and the second interview did not take place until 7:32 p.m. (R. 78:1025). There is not a "per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has

indicated a desire to remain silent." Michigan v. Mosley, 423 U.S. 96, 102-103 (1975); see also Kelly v. Lynaugh, 862 F.2d 1126, 1130-1131 (5th Cir. 1988) (seven to twelve-hour delays between assertions of right to remain silent and renewed questioning with new advisement of Miranda rights deemed to have scrupulously honored right to remain silent), cert. denied, 492 U.S. 925 (1989). Accordingly, Busby's right to remain silent was scrupulously honored.

Busby also contends that the State failed to establish that he did actually waive his constitutional rights.

"[A] determination of the issues of both the voluntariness of a confession and a knowing and intelligent waiver of Miranda rights requires an examination of the totality of the circumstances." Lukehart v. State, 776 So.2d 906, 917 (Fla. 2000), cert. denied, 533 U.S. 934 (2001) (citing Jennings v. State, 718 So.2d 144, 150 (Fla. 1998), cert. denied, 527 U.S. 1042 (1999)). The State carries a heavy burden to establish, by a preponderance of the evidence, that the waiver is knowing, intelligent, and voluntary. Ramirez v. State, 739 So.2d 568, 575 (Fla. 1999).

> Whether the rights were validly waived must be ascertained from two separate inquiries:
>
> > First, the relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the

> interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id.

Here, the record establishes that Busby understood his Miranda rights, and then proceeded to volunteer answers to questions posed to both Globe and Busby. "[W]aiver of *Miranda* rights need not be by affirmative response or express waiver once the warning has been given." Jordan v. State, 334 So.2d 589, 592 (Fla. 1976). As this Court has explained,

> the trial judge was quite proper in determining that the appellant had implicitly waived his *Miranda* rights. Implicit waiver can operate as effective waiver especially where adequate *Miranda* warnings are given and the suspect indicates an understanding thereof. *Jordan v. State*, 334 So.2d 589, 592 (Fla.1976). The record firmly establishes that appellant rendered his statement after having been first properly advised of his *Miranda* rights and having evidenced an understanding thereof. From such conduct we can safely infer appellant's intent to waive his *Miranda* protections.

Jones v. State, 440 So.2d 570, 574 (Fla. 1983). The fact that Busby had previously declined to talk to the authorities about the murder does not give rise to a heightened waiver requirement, and Busby fails to cite any authority for his belief that a distinct standard is required. Compare App.Br. at 63 (conclusory argument that "police should have done more . . . ."). Moreover, it is not Busby's silence that establishes the waiver but the fact that he volunteered answers

and added to information provided by his co-defendant.[7] Under these facts, the State has met its burden to establish that Busby indicated his desire to make a statement, and that his waiver was knowing, intelligent, and voluntary.

2. July 7, 2000 Statement

To the extent that Busby persists in his contention that his statement made on July 7th violated his privilege against self-incrimination, he offers no argument in support in his Initial Brief and has, accordingly, abandoned the claim. Marshall, 2003 Fla. LEXIS 1056 *47; Gore, 28 Fla. L. Weekly at S338 n.9.

And even if properly reviewable, the record clearly refutes any such claim of error. Inspector Schenck, who had interviewed Appellant during the July 3rd statement, see supra, at 53, also interviewed Appellant on July 7th (R. 1:89; R. 67:63). Agent Ugliano was also involved in both interviews (R. 1:89, 110). The July 7th statement was made at Union Correctional Institution (R. 1:89). Inspector Schenck advised Busby of his Miranda rights (R. 1:89; R. 67:63), which Appellant waived (R. 1:89; R.67:63). Busby thereupon discussed how he had planned to commit a murder and his actual killing of Ard (R. 1:90-108).

First, because the statement taken on July 3rd did not violate Appellant's Miranda rights, see supra, at 54-58, the July 7th statement is not inadmissible as the fruit of the poisonous tree. Johnson v. State, 660 So.2d 648, 659-660 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996). Furthermore, the record readily reflects that Busby was advised of his rights under Miranda, that he agreed to waive those rights, and that no threats or promises were made to induce his statement (R. 1:89, 109; see R. 67:63). Because Busby's

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7Although not raised by Appellant, statements made by co-defendant Globe are attributable to Busby as adoptive admissions, evidenced by Appellant's participation in and contribution to the joint confession. Nelson v. State, 748 So.2d 237, 242-243 (Fla. 1999), cert. denied, 528 U.S. 1123 (2000).

subsequent statement on July 7th was given following new Miranda warnings and was knowing and voluntary, any infirmity with the July 3rd did not taint the latter statement. See State v. Polanco, 658 So.2d 1123, 1126 (Fla. 3rd DCA 1995); State v. Hostzclaw, 351 So.2d 1033, 1036 (Fla. App. 1976).

B. Harmless Error

Lastly, even if the Court were to determine that admission of the July 3rd statement during the guilt-phase, or admission of the July 7th statement at the penalty-phase was error, Appellant would, nonetheless, not be entitled to relief. "The erroneous admission of statements obtained in violation of *Miranda* rights is subject to harmless error analysis.... Error is harmless if the reviewing court can say beyond a reasonable doubt that the error did not affect the verdict." Mansfield, 758 So.2d at 644 (internal citation and quotation marks omitted).

Here, Appellant was found locked in his cell with his cellmate murdered (R. 76:871), admitted to committing the murder in the letter written to his stepfather (R. 77:1003-1004), and was overheard telling co-defendant Globe that he had told some people about killing Ard (R. 77:934). Pertaining to the penalty-phase, each of the four aggravating circumstances, including that Busby had previously committed two murders, standing alone, was sufficient to outweigh any and all mitigating evidence (R. 86:1912-1913). Accordingly, there is no reasonable possibility that admission of either statement affected the verdict. Almeida v. State, 748 So.2d 922, 932 (Fla. 1999) (citing State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986)), cert. denied, 528 U.S. 1181 (2000).

For the foregoing reasons, Issue V should be denied.

VI.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT BUSBY AND HIS CO-DEFENDANT HAD TARGETED, ATTEMPTED TO LURE, AND PLANNED TO

KILL TWO OTHER INMATES IN THE MANNER THAT ARD WAS MURDERED.

Busby contends that the trial court erred in admitting evidence that several weeks prior to killing Ard, he and Globe had attempted to separately lure two other inmates, Alphonso Palmer and Roberto Rosa Torado, into Busby's cell to kill each by strangling them with a garrotte. App.Br. at 67. According to appellant, such Williams[8] rule evidence was not admissible under § 90.404(2)(a), Florida Statutes (1997), "because the facts of the threats were so vague and devoid of details that they share no similarities with those connected with the murder of Ard so as to show the defendant's motive or intent." App.Br. at 67-68. In addition, Busby argues that the evidence was not relevant to the issue of premeditation because "[s]trangulations, by their very nature, and particularly in this case, must involve an evil intent or premeditation. Busby's designs were never at issue." App.Br. at 69.

Prior to trial, the prosecution filed a notice of intent to introduce evidence of collateral crimes, wrongs, or acts pursuant to Williams and § 90.404(2), Fla. Stat. (1997) (R. 4:677; R. 11:2074). After Busby filed his written objections to the evidence (R. 8:1413-1416) and a hearing was held as to the admissibility of the evidence (R. 67:135-142), the trial judge overruled Busby's objection to the evidence (R. 13:2404).

Pursuant to § 90.404(2)(a),

> [s]imilar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

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8Williams v. State, 110 So.2d 654 (Fla. 1959).

accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Here, the prosecution sought to put on evidence of the other attempted murders for the follow reasons:

> And, basically, what the evidence would be introduced to prove is: No. 1, premeditation on the part of the defendant; that the premeditation began a long time before, continued for a good while; and then when the attempt to kill these two men had failed and did not look like it was going to come to fruition, then they changed their design and aim and killed Mr. Ard instead.
>
> So it goes to the issue of premeditation, and it also goes to the fact that it's almost inextricably bound up in the killing of Mr. Ard because Mr. Ard's death is a part of this general design to just kill inmates.
>
> It also goes to this: There's some indication that Mr. Globe desires to appear on behalf of Mr. Busby and to testify that Mr. Busby did not have anything to do with the crime. It was all Mr. Globe's idea, and that testimony and evidence will tend to refute that defense, and we can engage in the case law under Williams in anticipatory rebuttal.
>
> And so that the three rationale for the admission of the Williams Rule evidence that I had spoken to thus far is: No. 1, relevant to prove the issue of premeditation; No. 2, the death of Inmate Ard was inextricably bound up in the design to kill an inmate, of which the killing of, Rosa and Palmer were part of that design; No. 3, to rebut or refute the

implication that Mr. Busby was a minor actor in this, and that it was all Mr. Globe's idea.

Mr. Globe [sic], he had nothing to do with it; and 4thly, the methodology that was used shows the same modus operandi in that what they were trying to do was lure these two men into the cell where they could choke them.

So for those four reasons, the Williams Rule testimony that we're proffering is admissible.

(R. 67:137-138). The Williams rule evidence in this case came from the July 3, 2000 statement that Busby made with his co-defendant

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Contrary to Busby's assertions otherwise, the evidence was relevant to Busby's premeditation as to the murder of Elton Ard, particularly his intent, preparation, plan, and knowledge thereto, which was disputed based upon Globe's testimony that Busby was not even aware that Globe intended on killing Ard (R. 79:1245). The fact that the planned attempts to murder Palmer and Torado occurred no more than two months before Ard's murder does not render that evidence any less relevant. See Conahan v. State, 844 So.2d 629, 28 Fla. L. Weekly S70, S (Fla. 2003) (citing as Williams rule evidence an assault similar to the charged murder that occurred nearly two years prior to murder).

And even if not proper Williams rule evidence, Busby's statement of recent prior attempts to lure Palmer and Torado in order to kill them in the same manner that Ard was ultimately murdered, as part of Busby and Globe's plan to "just kill inmates," establishes that the evidence was properly admitted under § 90.402 as inextricably linked or intertwined with the crime charged. Coolen v. State, 696 So.2d 738, 742-743 (Fla. 1997). That Busby believes the evidence may have been easily excluded, App.Br. at 70, 71, is not determinative as to whether the State was entitled to

present the evidence. Such evidence "is admissible under section 90.402 because 'it is a relevant and inseparable part of the act which is in issue. . . . It is necessary to admit the evidence to adequately describe the deed.'" Griffin v. State, 639 So.2d 966, 968 (Fla. 1994) (quoting Charles W. Ehrhardt, Florida Evidence § 404.17 (1993 ed.), cert denied, 514 U.S. 1005 (1995). Here, Busby and Globe set out to kill inmates to send a message "to the harassers and abusers to stop." (R. 20:3838-3839; R. 78:1050). Ard, who was on the list of potential victims, became specially targeted only after the attempts on Palmer and Torado failed (R. 78:1033-1034, 1052-1053; R. 82:1565, 1567). Contrary to Appellant's assertion, the evidence did explain and throw light upon the crime prosecuted, as it supported the State's theory as to Busby's intent and refuted defense evidence that Busby did not know that Globe was going to kill Ard. Damren v. State, 696 So.2d 709, 711 (Fla. 1997), cert. denied, 522 U.S. 1054 (1998).

Finally, even if deemed error, admission of the evidence was harmless. Here, Appellant was found locked in his cell with his cellmate murdered (R. 76:871), admitted to committing the murder in the letter written to his stepfather (R. 77:1003-1004), and was overheard telling co-defendant Globe that he had told some people about killing Ard (R. 77:934). Pertaining to the penalty-phase, each of the four aggravating circumstances, including that Busby had previously committed two murders, standing alone, was sufficient to outweigh any and all mitigating evidence (R. 86:1912-1913). Accordingly, there is no reasonable possibility that admission of the plan to kill other inmates affected the verdict. Almeida, 748 So.2d at 932 (citing DiGuilio, 491 So.2d at 1139).

Based upon the foregoing, Issue VI should be denied.

VII.

THE TRIAL COURT PROPERLY ADMITTED THE TRANSCRIPT OF APPELLANT'S JULY 7, 2000 STATEMENT DURING THE PENALTY-PHASE, AS THE EVIDENCE MET THE REQUIREMENTS UNDER § 921.141,

AND IN ANY EVENT, WAS SECONDARY EVIDENCE BECAUSE THE AUDIOTAPE WAS NOT AVAILABLE AND THE TRANSCRIPT HAD PREVIOUSLY BEEN AUTHENTICATED.

Under Issue VII, Busby contends that the trial court erred in admitting into evidence during the penalty-phase the transcript of his July 7, 2000 statement to authorities. According to Busby, the State failed to authenticate the transcript and thus without properly establishing that the transcript was a duplicate of the audiotape, "it had no relevance to the penalty proceeding, even under the 'relaxed' rules of evidence . . . ." App.Br. at 77.

The starting point in evaluating Busby's claim is § 921.141(1), Fla. Stat., which provides in pertinent part that

> [a]ny such evidence which the court deems to have probative value may be received, *regardless of its admissibility under the exclusionary rules of evidence*, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

(emphasis added). "Under section 921.141, the linchpin of admissibility is whether the defendant has a 'fair opportunity to rebut any hearsay statements.'" Rodriguez v. State, 753 So.2d 29, 44 (Fla.), cert. denied, 531 U.S. 859 (2000). Wide latitude is permitted in admitting evidence during the penalty-phase, see Rutherford v. State, 727 So.2d 216, 221 (Fla. 1998), and "there should not be a narrow application or interpretation of the rules of evidence in the penalty hearing, whether in regard to relevance or any other matter except illegally seized evidence." Hildwin v. State, 531 So.2d 124, 127-128 (Fla. 1988), cert. granted on other grounds, aff'd at, 490 U.S. 638 (1989). The trial court will only be

reversed for an abuse of discretion. Perry v. State, 801 So.2d 78, 92 (Fla. 2001).

Here, Inspector Schenck, who interviewed Busby on July 7th, had compared the tape recording to the transcript *when he wrote his report* (R. 82:1551-1152). Thus Appellant's complaint that Schenck was relying upon his memory "about what was said in an interrogation that had happened a year earlier," App.Br. at 77, is a red-herring. Schenck, who was present when the statement was made, testified that the transcript fairly and accurately depicted his recollection of the conversation he had with Busby on July 7th (R. 82:1652).[9] The trial court resolved the constitutionality of the statement against Busby (R. 13:2408), and because the statement at issue was Busby's own statement and thus an admission, hearsay is not an issue. Thus the trial court did not abuse its discretion in admitting the transcript of the July 7, 2000 statement during the penalty-phase.

Even under the traditional evidentiary rules, the trial court properly admitted the transcript of Busby's July 7th statement.

Pursuant to § 90.952, Fla. Stat., "[e]xcept at otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph." Thus § 90.952 codifies the best evidence rule. Justus v. State, 438 So.2d 358, 364 (Fla. 1983), cert. denied, 465 U.S. 1052 (1984). Under § 90.953, Fla. Stat., however, "[a] duplicate is admissible to the same extent as an original . . . .", subject to three narrow exceptions. In this case, Appellant relies upon the exception

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9 While the prosecutor makes reference to "July the 3rd" (R. 82:1652), the prosecutor's prior question asking whether Inspector Schenck was able to locate the tape recording (R. 82:1652), where the recording of the July 3rd statement was not lost but had been admitted into evidence during the guilt-phase of trial and the prior statement directing Inspector Schenck's attention "to July the 7th" (R. 82:1651), clearly indicates that the prosecutor was referring to the July 7th statement.

in subsection 2, that "[a] genuine question is raised about the authenticity of the original or any other document or writing.

In Allen v. State, 492 So.2d 802 (Fla. 1st DCA 1986), the First District Court of Appeals upheld the admission of a transcript of the defendant's confession where the recording was lost by the State:

> The test for authentication under the code is whether the evidence is "sufficient to support a finding that the matter in question is what its proponent claims." *§ 90.901*, Fla. Stat. (1981). Further, in determining whether the evidence is sufficient for this purpose "the trial judge must evaluate each instance on its own merits, there being no specific list of requirements for such a determination." *Justus v. State, 438 So. 2d 358, 365 (Fla. 1983).* And, unless "clearly erroneous," the trial court's determination must stand. *Id. at 365. . . .*

Id. at 803. As was the case in Allen, Inspector Schenck was present when Busby made the statement on July 7, 2000, and testified that the transcript completely and accurately reflected the incriminating statements made by Appellant, contrary to Busby's assertion that "the State never asked Schenck if he based his conclusion of the transcript's accuracy on an independent knowledge and recollection of the events." (Compare App.Br. at 77 with R. 82:1552). And the fact that Inspector Schenck did not make a "'detailed comparison' of the then existent audio tape with the transcription" is irrelevant, as § 90.901 does not require that for authentication. See Grimes v. State, 244 So.2d 130, 135 (Fla. 1971) (in case where audiotape was not lost, transcript properly published but not admitted in that it was authenticated upon the police officer's testimony that he was present when statement was made, checked the recording, and the transcript was an accurate copy of the recording).

To the extent that Busby complains that the court failed to give a cautionary instruction, see App.Br. at 75 n.23, he should not be heard to complain, having failed to request such an instruction (R. 82:1556). Cf. McCall v. State, 463 So.2d 425, 426 (Fla. 3rd DCA 1985) ("[F]ailure to request a curative instruction precludes consideration of his argument that the prejudice was incurable.").

Finally, even if the trial court erred in admitting the July 7th statement, any such error was harmless. First, the substance of Busby's statement on July 7th was admitted during the guilt-phase through the properly admitted July 3rd statement (Compare R. 78:1025-1068 with R. 82:1556-1578). Moreover, each of the four aggravating circumstances, including that Busby had previously committed two murders, standing alone, was sufficient to outweigh any and all mitigating evidence (R. 86:1912-1913). Accordingly, there is no reasonable possibility that admission of the plan to kill other inmates affected the verdict. Almeida, 748 So.2d at 932 (citing DiGuilio, 491 So.2d at 1139).

Based upon the foregoing, Issue VII should be denied.

VIII.

THE TRIAL COURT PROPERLY FOUND THAT BUSBY COMMITTED THE MURDER IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, WHERE THE EVIDENCE REFUTED APPELLANT'S ASSERTION OF A COLORABLE CLAIM OF SELF-DEFENSE.

Busby does not challenge the trial court's determination as to the existence of the elements that the murder was cold, calculated, and premeditated[10], but instead contends that "[t]he

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10Nonetheless, the evidence adduced at trial establishes beyond a reasonable doubt that Busby committed Ard's murder in a cold, calculated and (continued...)

10(...continued)
premeditated manner. The trial court found the following facts establishing CCP:

> By your written and taped statements you had been contemplating the murder by ligature strangulation of an inmate or a correctional officer for months before Mr. Ard's death.
>
> The evidence indicated you thought long and hard about it.
>
> You got involved with punks, scoping out someone that would be loyal to you and help you kill someone.
>
> You made a list of people that you wanted to kill, and Mr. Ard was on that list.
>
> By your written and taped statements you decided to kill inmate Elton Ard more than 24 hours before the actual killing.
>
> By your written and taped statements you told Globe to prefabricate garrotes which you intended to strangle inmate Elton Ard with.
>
> By your written and taped statements you then attempted the strangulation of Elton Ard on at least three occasions before being able to carry it out as you had pre-planned.
>
> By your written and tape recorded statements you and Globe strangled the victim for an extended period of time.
>
> By your written and tape recorded statements, after a period of strangulation you both released the victim, then checked his vital signs to make sure the victim was dead.
>
> By your written and tape recorded statements, after believing that you possibly detected vital signs you then applied the second garrote to the victim and sat back to smoke a cigarette and watch inmate Ard die.

(continued...)

court erred in finding the CCP aggravator because Busby presented competent, substantial evidence to support his claim" that he had pretense of legal justification. App.Br. at 79.

"This Court's role in considering challenges to findings on aggravating circumstances is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." Duest v. State, ___ So.2d ___, 2003 Fla. LEXIS 1069 *29 (Fla. Jun. 26, 2003) (internal citation and quotation marks omitted).

> In order to establish the CCP aggravator, the evidence must show that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.

Brown v. State, 721 So.2d 274, 278-279 (Fla. 1998), cert. denied, 526 U.S. 1102 (1999).

Contrary to Appellant's suggestion that the Court has not said much regarding the "pretense of moral or legal justification" element of CCP, a number of opinions have addressed the matter.

10(...continued)

> You described how Ard must have struggled a good ten, fifteen minutes before he died.

(R. 86:1901-1902). These findings are amply supported by the record (R. 78:1035-1046, 1048-1054). This Court has upheld the CCP aggravator upon similar circumstances. See, e.g., Cox, 819 So. 2d at 709; Williamson v. State, 511 So.2d 289, 290-291 (Fla. 1987), cert. denied, 485 U.S. 929 (1988).

See, e.g., Cox, 819 So.2d at 721-722; Jackson v. State, 704 So.2d 500, 505 (Fla. 1997); Walls v. State, 641 So.2d 381, 388 (Fla. 1994), cert. denied, 513 U.S. 1130 (1995); Wuornos v. State, 644 So.2d 1000, 1008 (Fla. 1994) (internal citation omitted), cert. denied, 514 U.S. 1069 (1995); Jones v. State, 612 So.2d 1370, 1375 (Fla. 1992), cert. denied, 510 U.S. 836 (1993); Williamson, 511 So.2d at 293. As with the other elements of the aggravator, the State must prove beyond a reasonable doubt that the defendant had no pretense of moral or legal justification. Banda v. State, 536 So.2d 221, 224 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989). "A 'pretense' of the type required here is any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide." Wuornos, 644 So.2d at 1008 (internal citation omitted). In the case of a claim of self-defense, it has typically been based upon an allegation that "the victim had threatened violence against the defendant at some recent point in the past." Walls, 641 So.2d at 388.

Before the trial court on this issue, Busby did not contend that he killed Ard in self-defense, instead that he killed Ard to send a message "to the harassers and abusers to stop." (R. 20:3838-3839). Accordingly, the claim was not presented below and should be dismissed as procedurally barred. See Spann v. State, ___ So.2d ___, 28 Fla. L. Weekly S293, S296 (Fla. Apr.3, 2003) ("To be preserved for appeal, 'the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal.'") (quoting Rodriguez v. State, 609 So.2d 493, 499 (Fla. 1992)).

In any event, Busby is not entitled to relief. The trial court rejected Busby's assertion of a pretense of moral or legal justification as follows:

> As to the issue of a pretense of moral or legal justification, which is any claim of justification or excuse, though insufficient to reduce

the degree of murder, nevertheless, results in cold, calculated or premeditated nature of the murder. As justification or excuse for the killing of Elton Ard, you, by written and taped statements have offered the following.

That you were sexually harassed, and as a result of this sexual harassment Elton Ard deserved to die.

The Court finds this does not constitute a pretense of moral or legal justification for murder.

The murder was committed as a political statement to highlight the unfair treatment of prisoners in the Florida Department of Corrections.

The Court finds this does not constitute a pretense of moral or legal justification for the killing.

You asserted that the murder was committed in retaliation for verbal insults Inmate Ard made to you.

This does not constitute a pretense of moral or legal justification for murder.

(R. 86:1903)

Here, the record simply refutes Busby's assertion of a colorable claim that Ard's murder was motivated out of self-defense. Bell v. State, 699 So.2d 674, 678 (Fla. 1997), cert. denied, 522 U.S. 1123 (1998). The evidence established beyond a reasonable doubt that while the victim may have spread rumors about Busby "being a punk" (R. 78:1028), had gotten on his nerves (R. 78:1029), and had possibly been "coming on to" Busby (R.

78:1030), Ard had not threatened Busby. Indeed, while Appellant contends that "he killed Ard as a matter of self-defense," App.Br. at 82, and states that he "presented competent, substantial evidence to support his claim," App.Br. at 79, he misstates the record in asserting that "Ard had attacked him some time before July 3, 2000 (78 R 1034)." App.Br. at 81. To the contrary, the July 3, 2000 statement by Busby and Globe reflects that "[a] little Spanish dude . . . . [named] "*Eddie* somebody . . . ." had been grabbing Busby's "throat a few times, tried to put him down." (R. 78:1034; R. 1:119) (emphasis added). Busby and Globe then talked about when they had decided to murder the victim, Elton Ard (R. 78:1035). Ard was ultimately killed shortly upon his return to his prison cell, after he refused to engage in oral sex with Busby (R. 78:1037, 1039).

Accordingly, Busby's reliance upon Christian v. State, 550 So.2d 450 (Fla. 1989), cert. denied, 494 U.S. 1028 (1990), App.Br. at 80-81, is misplaced. In Christian, this Court found that "this record is replete with unrebutted evidence of the victim's threats of violence to Christian and his apparent inclination to fulfill them." Id. at 452. In the case at bar, Ard did nothing that would support a colorable claim of self-defense on Busby's part. Zack v. State, 753 So.2d 9, 21 (Fla.), cert. denied, 531 U.S. 858 (2000); Jackson, 704 So.2d at 505. The facts presented are similar to those in Williamson, where this Court rejected the defendant's assertion of a pretense of moral or legal justification where "[t]here is no evidence of any threatening acts by [victim] prior to the murder; nor is there any evidence that [victim] planned to attack either Omer or Williamson [defendant's partner and defendant]." Id., 511 So.2d at 293.

Based upon the foregoing, Issue VIII is without merit and should be denied.

IX.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING, DURING THE PENALTY-PHASE OF TRIAL, APPELLANT'S PROFFERED

EVIDENCE INCLUDING HEARSAY STATEMENTS THAT THE STATE DID NOT HAVE A FAIR OPPORTUNITY TO REBUT.

Busby contends that the trial court erroneously failed to admit "several pieces of evidence through Nan Jobson . . . ." proffered by the defense during the penalty-phase of trial. App.Br. at 83. At issue are three items: Defendant's Exhibit 74, "something that Andy dictated to [Jobson] about his mother and his struggles with his mother" (R. 83:1751), and Defendant's Exhibits 73-B and 73-C, two videotapes of role-playing by Busby and his father "acting out different situations as far as trauma to try to resolve the trauma that had occurred to him regarding situations with his mother, regarding situations with his father." (R. 83:1784-1787). App.Br. at 83.

Hearsay evidence may be admissible at the penalty-phase of trial provided that the opposing party has the opportunity to rebut the evidence. § 921.141(1). Here, the State did not have a fair opportunity to rebut the hearsay, as it could not confront the declarant because Busby did not testify at the penalty-phase. That the State could have cross-examined Jobson, to whom Busby sent the letter, is not the issue. See Mendoza v. State, 700 So.2d 670, 675 (Fla. 1997) (application for political asylum not admissible as its preparer was not identified), cert. denied, 525 U.S. 839 (1998); Rodriguez, 753 So.2d at 44 (observing that the requirement of having the opportunity to rebut out-of-court statements is not met where co-defendants did not testify); compare Zack, 753 So.2d at 23 (defendant had opportunity to cross-examine out-of-court declarant); Lawrence v. State, 691 So.2d 1068, 1073 (Fla.) (defendant had opportunity to cross-examine declarant at prior trial), cert. denied, 522 U.S. 880 (1997). In addition, self-serving statements made by the defendant are not admissible. Mendoza, 700 So.2d at 675; Griffin, 639 So.2d at 970.

In any event, Busby presented mitigation evidence concerning the physical, emotional, and sexual abuse he

experienced as a child, perpetrated by family, foster parents, and others, and the effect that it had upon him (R. 83:1728-1757). In addition, evidence concerning Busby's relationship with his mother (R. 83:1672-1673), and his mental health and other records maintained by the DCF were admitted during the penalty-phase of trial (R. 83:1703-1713). Thus because the same information was before the jury, Busby fails to demonstrate any prejudice from the trial court excluding the hearsay evidence. Mendoza, 700 So.2d at 675 (failure to admit hearsay harmless beyond a reasonable doubt where evidence was cumulative); Stewart v. State, 549 So.2d 171, 174-175 (Fla. 1989) (same), cert. denied, 497 U.S. 1032 (1990).

Based upon the foregoing, Issue IX should be denied.

X.

THE TRIAL COURT PROPERLY ADMITTED, DURING THE PENALTY-PHASE OF TRIAL, APPELLANT'S LETTER WRITTEN TO HIS CO-DEFENDANT, WHERE THE LETTER WAS PROBATIVE OF THE DEGREE OF BUSBY'S ROLE IN ARD'S MURDER AS DEMONSTRATED BY THE NATURE OF BUSBY'S RELATIONSHIP WITH GLOBE.

Busby contends that the trial court erred in admitting during the penalty-phase "a letter purportedly written by Busby to Charles Globe" because it included "Busby's repeated professions of love for Globe and his explicit sexual desires for the man that had no or little relevance to what penalty Busby should receive (15 R 1583-1587)." App.Br. at 86. In conclusory fashion, Busby contends that "its overwhelming, explicit sexual content served only to inflame the jury and unfairly prejudice him in their minds." Id.

"At the outset, it must be remembered that there is a different standard for judging the admissibility and relevance of evidence in the penalty phase of a capital case, where the focus is substantially directed toward the defendant's character." Perry, 801

So.2d at 89. Section 921.141(1), Fla. Stat., governs Appellant's claim. That provision states in pertinent part that

> [a]ny such evidence which the court deems to have probative value may be received, *regardless of its admissibility under the exclusionary rules of evidence*, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

(emphasis added). "Under section 921.141, the linchpin of admissibility is whether the defendant has a 'fair opportunity to rebut any hearsay statements.'" Rodriguez, 753 So.2d at 44. Wide latitude is permitted in admitting evidence during the penalty-phase, see Rutherford, 727 So.2d at 221. The trial court will only be reversed for an abuse of discretion. Perry, 801 So.2d at 92.

Here, the prosecutor offered the letter that was identified by the State's handwriting expert as having been written by Busby, on the following basis:

> Well, the relevance of the letter is this: The defense has always contended that it was Mr. Globe who was the main actor; that Mr. Busby tried to stop him and so forth, and this letter goes right to the heart of that where Mr. Busby in his letter to Mr. Globe says, where do you believe I would be right now if it wasn't for you, for your love and support? I would be on trial for another murder.
>
> And that shows that Mr. Busby was a full participant in this one and Mr. Globe, in fact, held Mr. Busby back from acts of violence in the past and goes right to the heart of the defense.

(R. 82:158-1582).

"Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence." Rhodes v. State, 547 So.2d 1201, 1204 (Fla. 1989). Busby's relationship with his co-defendant and his status as a "punk," someone who could be forced into having homosexual sex (see R. 82:1588), was inextricably intertwined with Busby's motive in committing Ard's murder (see R. 78:1027-1028, 1050; R. 80:1298-1299; R. 82:1563-1564, 1568, 1588). Compare Bowles v. State, 716 So.2d 769, 773 (Fla. 1998) (evidence and argument concerning the defendant's alleged hatred of homosexual men was not relevant to any issue and "were simply an attack on appellant's character unconnected to this murder."). Moreover, the nature of Busby's relationship with Globe was relevant to the extent of Busby's involvement in the crime -- that he was the principal agent behind the murder plot, as evidenced by his statement that but for Globe's actions, Busby would have been on trial for another murder -- and thus to his culpability for the murder.

While stating that the evidence had little or no relevance, Busby's chief complaint is that the prejudice created by the letter outweighed its probative value. App.Br. at 87-88. Busby fails to acknowledge, however, that pursuant to § 921.141(1), the appropriate inquiry is whether it was probative "*regardless* of its admissibility under the exclusionary rules of evidence." (emphasis added). Because § 90.403, providing for the exclusion of evidence on grounds of prejudice or confusion is an exclusionary rule of evidence, it has no application to the admissibility of evidence under § 921.141(1). But see Mendyk v. State, 545 So.2d 846, 849 (Fla.) (potential confusion and unfair prejudice far outweighed any probative value in admitting titles from pornographic books and magazines seized from defendant's home; § 921.141(1) not addressed), cert. denied, 493 U.S. 984 (1989). Nonetheless, at no time did Appellant request that the trial court redact any portion of

the letter that he believed to be unduly prejudicial (see R. 82: 1581-1583), and has therefore defaulted upon the claim. Compare Smith v. State, 711 So.2d 581, 582 (Fla. 2nd DCA 1998) (holding that trial court's failure to redact from defendant's video confession the inadmissible and prejudicial portions was harmless error).

Finally, even if this Court determines that the trial court erred in admitting Busby's letter to Globe, any such error was harmless. First, Appellant ignores the fact that the defense itself made the jury aware that Busby was involved in a homosexual relationship with Globe. Indeed, Globe previously testified that after he killed Ard, he and Busby engaged in consensual sex (R. 79:1250). Secondly, the prosecutor did not even mention the sexual nature of Appellant's relationship with Globe during his penalty-phase closing argument (see R. 84:1800-1817). And finally, in light of the overwhelming evidence in aggravation, there is not a reasonable probability that the jury would have recommended a sentence of life and that the trial court would have imposed same, absent admission of Busby's letter.

Based upon the foregoing, Issue X should be denied.

XI.

APPELLANT IS NOT ENTITLED TO RELIEF UNDER RING v. ARIZONA, 536 U.S. 584 (2002) OR APPRENDI v. NEW JERSEY, 530 U.S. 166 (2000).

Under Issue XI, Busby challenges Florida's death penalty scheme on the basis of Ring v. Arizona, 536 U.S. 584 (2002) and Apprendi v. New Jersey, 530 U.S. 166 (2000). In recognizing that this Court in Mills v. Moore, 786 So.2d 532, 538 (Fla. 2001), held that Apprendi did not apply to Florida's death penalty statute, Busby raises the claim "to preserve this issue in case Harry Potter waves his wand and this Court reverses itself." App.Br. at 90.

On appeal, Busby "argues that the Sixth Amendment requires Florida juries to unanimously recommend death before the trial judge can impose that sentence." App.Br. at 90.

Contrary to Busby's apparent belief otherwise, Ring did not hold that the jury's vote must be unanimous. This Court has recognized as much. See, e.g., Porter v. Crosby, 840 So.2d 981, 986 (Fla. 2003); Cole v. State, 841 So.2d 409, 429-430 (Fla. 2003).

In any event, Busby ignores the fact that two of the aggravating circumstances were prior violent felony convictions, of which he was unanimously convicted (R. 82:1548-1549). Relief is therefore not warranted. Thibault v. State, ___ So.2d ___, 28 Fla. L. Weekly S486, S___ (Fla. Jun. 26, 2003); Duest, ___ So.2d at ___; 2003 Fla. LEXIS 1069 *39; Lugo v. State, ___ So.2d ___, 28 Fla. L. Weekly S159, S173 n.79 (Fla. Feb. 20, 2003); Doorbal v. State, 837 So.2d 940, 963 (Fla. 2003).

Issue XI should, therefore, be denied.

XII.

THE TRIAL COURT PROPERLY PERMITTED THE STATE TO PRESENT EVIDENCE OF THE CIRCUMSTANCES UNDERLYING BUSBY'S PRIOR CONVICTIONS FOR FIRST DEGREE MURDER IN SUPPORT OF THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE, AS SUCH EVIDENCE WAS RELEVANT TO BUSBY'S CHARACTER, CONSTITUTING A PROPER CONSIDERATION DURING THE PENALTY-PHASE OF TRIAL.

Busby challenges the admission of facts underlying his prior violent felony convictions. While admitting that this claim has been decided adversely to his position, Appellant raises it "in the hopes that someday this Court will come to its senses and realize the mistake it has made and grant the defendant relief." App.Br. at 93. Busby further argues that Cox v. State, 819 So.2d 705 (Fla. 2002)

should be reconsidered as "the prejudicial impact of facts surrounding the two murders he had committed outweighed any probative value they may have had." App.Br. at 94.

In Cox, this Court upheld the admission of facts underlying the prior violent felony conviction, stating:

> We have consistently stated that "any relevant evidence as to the defendant's character or the circumstances of the crime is admissible [during capital] sentencing" proceedings. *Stano v. State, 473 So. 2d 1282, 1286 (Fla. 1985);* see also *Rhodes, 547 So.2d at 1204* ("Testimony concerning the events which resulted in the [prior] conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence."); *§ 921.141(1), Fla. Stat.* (2001) ("In the [capital sentencing] proceeding, evidence may be presented as to any matter that the court deems relevant to . . . the character of the defendant . . . . "). Thus, the holdings of *Old Chief, 519 U.S. 172* and *Brown, 719 So.2d 882* are not properly analogized to this capital sentencing proceeding, where "the point at issue" is much more than just the defendant's "legal status."
>
> As "admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion," *Ray v. State, 755 So. 2d 604, 610 (Fla. 2000),* there is no basis to reverse the ruling of the court below admitting testimonial evidence of the appellant's prior violent felonies at trial. This evidence was not emphasized to the level of rendering the prior offenses a central feature of the

> penalty phase.[12] See *Rodriguez v. State, 753 So. 2d 29, 44-45 (Fla. 2000); Finney v. State, 660 So. 2d 674, 683 (Fla. 1995).* Therefore, we affirm the trial court's decision allowing the admission of this evidence.
>
> ---
>
> [12] The record reflects each witness's simply relating Cox's crimes against him or her. No emotional displays or breakdowns occurred.

Cox, 819 So.2d at 716-717.

Busby makes no attempt to demonstrate that under the applicable standard, the trial court abused its discretion. In fact, before the trial court, Appellant challenged the admissibility of the evidence on a different legal basis, that the State had failed to establish that the statement was made pursuant to a knowing and intelligent waiver of rights (R. 82:1612). Thus Busby's challenge now premised upon the prejudicial value of the evidence is procedurally defaulted. See Spann, 28 Fla. L. Weekly at S296 ("To be preserved for appeal, 'the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal.'") (quoting Rodriguez, 609 So.2d at 499).

In any event, here the State presented Busby's confession through a neutral witness relative to his conviction on the two counts of first degree murder (R. 82:1623-1632). Obviously Busby's own description of those murders was highly relevant to his character, which is a proper consideration during the penalty-phase. Zant v. Stephens, 462 U.S. 862, 879 (1983). Section 921.141(1) governs the admissibility of evidence during the penalty-phase, and provides for the admission of constitutionally-obtained evidence "which the court deems to have probative value . . . regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is afforded a fair opportunity to rebut any hearsay

statements." Thus under the statute, "the linchpin of admissibility is whether the defendant has a 'fair opportunity to rebut any hearsay statements.'" Rodriguez, 753 So.2d at 44. Because the facts underlying the prior violent felony convictions came from Busby himself, and absent a demonstration that the trial court abused its discretion in admitting the evidence, he should not be heard to complain.

Based upon the foregoing, Issue XII should be denied

XIII.

THE TRIAL COURT DID NOT ERR UPON INSTRUCTING THE JURY DURING THE PENALTY-PHASE OF TRIAL WITH THE STANDARD JURY INSTRUCTIONS.

Appellant requests that the Court reconsider its rulings previously upholding the Florida Standard Jury Instructions as in compliance with Caldwell v. Mississippi, 472 U.S. 320 (1985), citing Burns v. State, 699 So.2d 646, 654 (Fla. 1997), cert. denied, 522 U.S. 1121 (1998), Sochor v. State, 619 So.2d 285, 291-292 (Fla.), cert. denied, 510 U.S. 1025 (1993), and Thomas v. State, 838 So.2d 535, 541-542 (Fla. 2003), on the basis of Justice Lewis' concurrence in Bottoson v. Moore, 833 So.2d 693, 731-734 (Fla.), cert. denied, 123 S.Ct. 662 (2002). App.Br. at 96.

Before the trial court, Busby filed a "Motion In Limine To Strike Portions Of 'Florida Standard Jury Instructions In Criminal Cases' Re: Caldwell Vs. Mississippi" (R. 8:1499). Therein, Appellant argued that the jury instructions and any comments "which would lead the jury to believe that their decision in the penalty portion of the trial is advisory, or a recommendation, or that the responsibility for determining appropriateness of MR. BUSBY's death rests elsewhere other than with them" is unconstitutional under Caldwell (R. 8:1500). After providing the parties with an opportunity to make additional argument on the issue, the trial court denied the motion (R. 13:2406). At trial, Busby renewed his

objections to the instructions, which the trial court overruled (R. 82:1545-1547). In addition, the trial court declined to give Appellant's proposed instructions (R. 84:1795).

As Busby recognizes, this Court has repeatedly held that the Florida Standard Jury Instructions are in compliance with Caldwell. See, e.g., Floyd v. State, ___ So.2d ___, 27 Fla. L. Weekly S697, S703 (Fla. Aug. 22, 2002) (citing cases); Brown, 721 So.2d at 283 (citing cases); Burns, 699 So.2d at 654. "To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury under local law." Dugger v. Adams, 489 U.S. 401, 407 (1989).

Here, as this Court has held, and notwithstanding Busby's conclusory assertion to the contrary, the instructions properly informed the jury of its role under Florida law, and thus any claim of a Caldwell violation is without merit. See Romano v. Oklahoma, 512 U.S. 1, 9 (1994) ("The infirmity identified in Caldwell is simply absent in this case: Here, the jury was not affirmatively misled regarding its role in the sentencing process."). Moreover, in properly instructing the jury regarding its advisory role, at no time was the jury's sense of responsibility diminished in respect to its role in respect to its consideration of the aggravating circumstances. To the contrary, the jury was instructed that its advisory sentence "must be based on" whether it found certain aggravating circumstances, any mitigating circumstances, and whether the aggravators outweighed the mitigation evidence (R. 84:1859).

Subsequent to this Court's decision in Bottoson, the Court has rejected similar challenges based upon Caldwell. See, e.g., Jones v. State, ___ So.2d ___, 28 Fla. L. Weekly S395, S397 n.4 (Fla. May 8, 2003); Gore, 28 Fla. L. Weekly at S337 n.4; Thomas, 838 So.2d at 541-542.

Issue XIII should, therefore, be denied.

XIV.

BUSBY'S CONVICTION IS SUPPORTED BY SUFFICIENT EVIDENCE BEYOND A REASONABLE DOUBT AND THE DEATH SENTENCE IS PROPORTIONATE TO THAT IN OTHER CAPITAL CASES.

"This Court has the obligation to independently review the record for sufficiency of the evidence." Taylor v. State, ___ So.2d ___, 28 Fla. L. Weekly S439, S441 (Fla. Jun. 5, 2003). Here, Busby was charged with first degree premeditated murder of Elton Ard by choking or strangulation (R. 1:1). The jury was instructed on premeditated first degree murder as follows:

> First, that Elton Ard is dead; the death was caused by the criminal act or agency of Andrew Busby; and thirdly, there was a premeditated killing of Elton Ard.
>
> Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix an exact period of time that must pass between the formulation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

(R. 81:1502-1503).

"In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." Bradley v. State, 787 So.2d 732, 738 (Fla.), cert. denied, 534 U.S. 1048 (2001). The evidence established Ard died as the result of the actions of Busby and Globe, through manual and ligature strangulation (R. 77:963). The garrote used on Ard was made by Globe at Busby's direction (R. 81:1386). Busby, who initially had decided to kill Roberto Rosa Torado, turned his attention to Ard as one of several potential victims (R. 78:1028). For three days before committing the murder, Busby and Globe targeted Ard but they did not have the opportunity to kill him (R. 78:1035). The night before the murder, Busby told Globe that they would carry out their plan the following morning (R. 78:1035-1036). After determining that Ard was still alive notwithstanding being manually strangled and beaten about the face, the second garrote was very tightly put around Ard's neck and Busby and Globe watched him struggle for air six times before he finally died (R. 78:1044). Ard was killed to send a message to the prison population (R. 20:3838-3839; R. 78:1050). The evidence overwhelmingly supports Busby's conviction of first degree premeditated murder. Cf. Young v. State, 579 So.2d 721, 723 (Fla. 1991) (defendant brought murder weapon with him to the scene; weapon had to be reloaded), cert. denied, 502 U.S. 1105 (1992).

This Court also has "an independent obligation to review each death case to determine whether death is the appropriate punishment." Philmore v. State, 820 So.2d 919, 939 (Fla.), cert. denied, 123 S.Ct. 179 (2002). Regarding proportionality review, this Court has recently stated the following:

> Due to the uniqueness and finality of death, this Court addresses the propriety of all death sentences in a proportionality review. See Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). In conducting this review, this Court considers the totality of the circumstances in a case as compared to other cases

> in which the death penalty has been imposed, thereby providing for uniformity in the application of the death penalty. See Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998); Porter v. State, 564 So. 2d at 1064. This Court's function in a proportionality review is not to reweigh the mitigating factors against the aggravating factors; that is the function of the trial court. See Bates v. State, 750 So. 2d 6, 14-15 (Fla. 1999). The death penalty is reserved for only the most aggravated and the least mitigated of first-degree murders. See Urbin, 714 So. 2d at 416.

Taylor, 28 Fla. L. Weekly at S447. Moreover, in conducting its proportionality review, the Court "accepts the jury's recommendation and the trial judge's weighing of the aggravating and mitigating evidence." Duest, 2003 Fla. LEXIS 1069 *33-34.

As discussed previously, supra, at 71-76, the CCP aggravator was properly found. As for the HAC aggravator, "[b]ecause strangulation of a conscious victim involves foreknowledge and the extreme anxiety of impending death, death by strangulation constitutes prima facie evidence of HAC." Barnhill v. State, 834 So.2d 836, 849-850 (Fla. 2002) (citing Mansfield, 758 So.2d at 645 and Orme v. State, 677 So.2d 258, 263 (Fla.1996), cert. denied, 519 U.S. 1079 (1997)). The fact that both CCP and HAC were present is significant for purposes of proportionality review. Nelson , 27 Fla. L. Weekly at S803. Moreover, Busby had been convicted of two prior violent felonies -- to wit: two counts of first degree murder.

In addition, there is nothing disproportionate in imposing a death sentence in the case of murder committed at a correctional facility by a prisoner upon a fellow inmate. See, e.g., Cox, 819 So.2d at 723-724; Kilgore v. State, 688 So.2d 895, 897 (Fla. 1996), cert. denied, 522 U.S. 832 (1997); Marshall v. State, 604 So.2d 799, 802 (Fla. 1992); Williamson, 511 So.2d at 290-291; Lusk, 446

So.2d at 1042-1043; Agan v. State, 445 So.2d 326, 328-329 (Fla. 1983), cert. denied, 469 U.S. 873 (1984).

Further, the Court has upheld the imposition of a death sentence in strangulation cases. See, e.g., Barnhill, 834 So.2d at 849-853; Ocha v. State, 826 So.2d 956, 966 (Fla. 2002); Bowles v. State, 804 So.2d 1173, 1184 (Fla. 2001), cert. denied, 122 S.Ct. 2603 (2002); Blackwood v. State, 777 So.2d 399, 412 (Fla. 2000), cert. denied, 122 S.Ct. 2603 (2002).

Finally, Busby's co-defendant, Globe, also received a sentence of death.

Based upon the foregoing, the judgment of conviction and sentence should be affirmed, as the evidence was sufficient to support the conviction and death is the proper sentence in this case.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment of conviction and sentence should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of the foregoing was mailed, postage prepaid, on this ____ day of July, 2003, to:

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CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel hereby certifies that this brief was typed using Times New Roman 14-point font, in conformity with Fla. R. App. P. 9.210(a).

_____
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IN THE SUPREME COURT OF FLORIDA

ANDREW DARRYL BUSBY,

Appellant,

v. CASE NO. **SC02-1364**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **THIRD** JUDICIAL CIRCUIT
IN AND FOR **COLUMBIA** COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

ARGUMENT

I. THE COURT ERRED IN REFUSING TO GRANT BUSBY'S CAUSE CHALLENGES TO PROSPECTIVE JUROR KIM LAPAN, A FORMER GUARD OF DEATH ROW PRISONERS AND ONE WHO HAD A BIAS AGAINST THEM, WHICH FORCED HIM TO USE A PEREMPTORY CHALLENGE TO KEEP HIM OFF HIS JURY, A VIOLATION OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS 2

II. THE COURT ERRED IN EXCLUDING THE TESTIMONY OF MARTHA JOBSON, A SOCIAL WORKER, WHO WOULD HAVE TESTIFIED THAT BUSBY SUFFERED FROM POST-TRAUMATIC STRESS DISORDER, WHERE SUCH EVIDENCE WOULD HAVE SUPPORTED AND JUSTIFIED A DEFENSE OF SELF-DEFENSE, A VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 7

TABLE OF CONTENTS

(Continued)

Page

III. THE COURT ERRED IN ALLOWING STATE ATTORNEY INVESTIGATOR LISA LONG TO TESTIFY THAT SHE SAW BUSBY MAKE SOME HAND GESTURES DURING THE TESTIMONY OF CHARLES GLOBE, AND IT ALSO ERRED IN ALLOWING THE STATE TO READ, AS SUBSTANTIVE EVIDENCE OF GUILT, THE TESTIMONY OF ANDREW BUSBY WHEN HE TOOK THE STAND AFTER LONG ONLY TO EXPLAIN THE GESTURES, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS 12

IV. THE COURT ERRED IN REFUSING TO GIVE BUSBY HIS DUE PROCESS RIGHT TO PRESENT HIS DEFENSE IN THE WAY HE CHOSE WHEN IT REFUSED TO LET HIS CO-DEFENDANT, CHARLES GLOBE, TESTIFY BEFORE THE JURY LIVE AND IN PERSON, BUT INSISTED HE DO SO ONLY BY VIDEOTAPE, A VIOLATION OF BUSBY'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS 14

TABLE OF CONTENTS

(Continued)

Page

V. THE COURT ERRED IN DENYING BUSBY'S MOTION TO SUPPRESS STATEMENTS HE MADE TO LAW ENFORCEMENT OFFICERS AFTER HE TOLD THEM HE DID NOT WANT TO TALK WITH THEM, A VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND HIS RIGHTS UNDER ARTICLE I, SECTION IX OF THE FLORIDA CONSTITUTION 16

VI. THE COURT ERRED IN ADMITTING, AS WILLIAMS RULE EVIDENCE THAT BUSBY WANTED TO KILL A ROBERTO ROSA AND ALPHONSO PALMER, A VIOLATION OF THE DEFENDANT'S CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR TRIAL 18

VII. THE COURT ERRED IN ADMITTING A TRANSCRIPT OF BUSBY'S JULY 7, 2000 CONFESSION RATHER THAN THE ORIGINAL AUDIOTAPE OF THAT STATEMENT, A VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL 19

TABLE OF CONTENTS

(Continued)

Page

VIII. THE COURT ERRED IN FINDING BUSBY MURDERED ELTON ARD IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, A VIOLATION OF THE DEFENDANT'S EIGHTH AMENDMENT RIGHTS 20

IX. THE COURT ERRED IN REFUSING TO ADMIT SEVERAL EXHIBITS BUSBY OFFERED DURING THE PENALTY PHASE PORTION OF HIS TRIAL, WHICH WOULD HAVE HELPED THE JURY UNDERSTAND WHY HE HAD BEEN DIAGNOSED AS SUFFERING FROM POST TRAUMATIC STRESS DISORDER, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS 21

X. THE COURT ERRED IN ADMITTING A LETTER BUSBY OSTENSIBLY WROTE TO CHARLES GLOBE BECAUSE ITS PREJUDICIAL VALUE SUBSTANTIALLY OUTWEIGHED ITS LIMITED RELEVANCE, A VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL 23

TABLE OF CONTENTS

(Continued)

Page

XI. THE COURT ERRED IN SENTENCING BUSBY TO DEATH BECAUSE SECTION 921.141 FLORIDA STATUTES UNCONSTITUTIONALLY ALLOWED THE TRIAL COURT TO SENTENCE HIM TO DO SO WITHOUT, AMONG OTHER THINGS, A UNANIMOUS DEATH RECOMMENDATION FROM THE JURY 26

XII. THE COURT ERRED IN ALLOWING THE STATE TO PRESENT EVIDENCE BEYOND THE FACT THAT BUSBY HAD TWO PRIOR FIRST-DEGREE MURDER CONVICTIONS IN SUPPORT OF THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR, A VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS 27

XIII. THE TRIAL COURT ERRED IN REPEATEDLY INSTRUCTING THE JURY THAT THEIR RECOMMENDATION WAS JUST THAT, A RECOMMENDATION, A VIOLATION OF BUSBY'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS 27

CONCLUSION 28

CERTIFICATE OF SERVICE 28

CERTIFICATE OF FONT SIZE 29

TABLE OF CITATIONS

CASES	PAGE(S)
Bryant v. State, 656 So.2d 426 (Fla. 1995)	5
Cannady v. State, 620 So.2d 165 (Fla. 1993)	23,24
Duest v. State, Case No. SC00-2366 (Fla. June 26, 2003)	26
Gootee v. Cleveninger, 778 So.2d 1005 (Fla. 5th DCA 2000)	2,4
Hayes v. State, 581 So.2d 121 (Fla. 1991)	13
Logan v. State, 846 So.2d 472 (Fla. 2003)	15
Perry v. State, 801 So.2d 78, 90 (Fla. 2001)	24
Ring v. Arizona, 536 U.S. 584 (2002)	26
Ross v. Oklahoma, 487 U.S. 81 (1988)	4
Shannon v. State, 770 So.2d 714 (Fla. 4th DCA 2000)	5
Simmons v. United States, 390 U.S. 377 (1968)	13
Spencer v. State, 645 So.2d 377 (Fla. 1994)	21
State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)	22
State v. Dupree, 656 so.2d 430 (Fla. 1995)	24
State v. Hickson, 630 So.2d 172 (Fla. 1993)	7,9
State v. McClain, 525 So.2d 420 (Fla. 1988)	21
State v. Mizell, 773 So.2d 618 (Fla. 1st DCA 2000)	9

TABLE OF CITATIONS

(Continued)

CASES **PAGE(S)**

Trotter v. State, 576 So.2d 691 (Fla. 1990) 2,3,4

Windom v. State, 656 So.2d 420 (Fla.1995) 24

CONSTITUTIONS AND STATUTES

United States Constitution
Amendment V 13
Amendment VI 2

Florida Statutes (2000)
Section 921.141(1) 24
Section 924.051 24

OTHER SOURCES

Florida Rules of Appellate Procedure
Rule 9.210 28

IN THE SUPREME COURT OF FLORIDA

ANDREW DARRYL BUSBY,

Appellant,

v. CASE NO. **SC02-1364**

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant was the defendant in the trial court and will be referred to herein as either "defendant," "appellant" or by his proper name. References to the record shall be by the volume number in Roman numerals, followed by the appropriate page number, both in parentheses. References to the State's brief shall be by "Appellee's Brief" followed by the appropriate page numbers.

ARGUMENT

ISSUE I

THE COURT ERRED IN REFUSING TO GRANT BUSBY'S CAUSE CHALLENGES TO PROSPECTIVE JUROR KIM LAPAN, A FORMER GUARD OF DEATH ROW PRISONERS AND ONE WHO HAD A BIAS AGAINST THEM, WHICH FORCED HIM TO USE A PEREMPTORY CHALLENGE TO KEEP HIM OFF HIS JURY, A VIOLATION OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The issue presented here is quite simple: Did the court correctly deny Busby's cause challenge for prospective juror Lapan. If not, and if he preserved the issue, as required by Trotter v. State, 576 So.2d 691 (Fla. 1990), reversal is automatic because he did not have the impartial jury guaranteed by the Sixth Amendment. Id. at 693; Gootee v. Cleveninger, 778 So.2d 1005 (Fla. 5th DCA 2000).

On page 32 of its brief the State quotes from this Court's opinion in Trotter that "Under federal law [then], the defendant must show that a biased juror was seated." That, of course, begs the question of how does Busby show a biased juror sat? If we continue reading Trotter, that case provides the answer.

> Under Florida law, "[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted." Pentecost v. State, 545 So.2d 861, 863 n.1 (Fla. 1989). By this we mean the following. Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have

> struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted. The defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial.

Trotter, at p. 693. (Footnotes omitted).

Thus, if, because the court wrongly forced Busby to exercise a peremptory challenge on Lapan, the defendant exhausted his peremptory challenges before he could challenge either Winston or Liebel peremptorily, and one or both of them sat as one of his jurors, then a biased juror sat, and Busby was denied the impartial jury the Sixth Amendment guarantees. Unlike Trotter, he never "stood by silently," voicing no objection to those two jurors who sat on his jury. Instead he complained by objecting to them and requesting additional peremptory challenges so he could have them removed. Unlike Trotter, who did nothing beyond exhausting his peremptory challenges, Busby objected to specific venirepersons who ultimately sat on his jury. If the trial judge had not improperly denied his cause challenge on Lapan, he would have removed at least one of them peremptorily. Because, however, the lower court wrongly forced the defendant to use one of his peremptory challenges, he has established reversible error, and this Court should reverse the trial court's judgment and sentence and remand for a new trial.

The State, on page 33 of its brief says "Busby makes no attempt to demonstrate that the jury that did sit at his trial was not impartial or that the veniremen that he would have struck with

additional peremptory challenges were unqualified."[1] He most certainly did. When he exhausted his peremptory challenges, requested more, and then said he would use them on prospective jurors Winston and Liebel, he was telling the court that he did not have an impartial jury, and that again neither of them were qualified to sit. That is all the law required for him to show a denial of state and federal right to a fair and impartial jury. Trotter; Ross v. Oklahoma, 487 U.S. 81 (1988)..

The State, on page 34 of its brief, however, says the law requires more. Regarding prospective juror Winston, it claims Busby had an impartial jury because "Busby did not move to strike venireman Winston for cause." This Court, as it held in Trotter, demands only that he have tried to challenge him peremptorily, which is what he did (75 R 744). Busby was denied his constitutionally guaranteed impartial jury because the trial court failed to peremptorily excuse Winston or Liebel, and not because they were excusable for cause.

> Neither *Trotter*, nor any other authority cited by the state, requires an explanation as to why the juror who sat was objectionable. Nor should an explanation be required since a peremptory challenge is, by definition, a challenge that "need not be supported by any reason, although a party may not use such a challenge in a way that discriminates against a protected minority." Black's Law Dictionary 223 (7th ed. 1999).

Shannon v. State, 770 So.2d 714, 716 (Fla. 4th DCA 2000).

So, because Busby preserved this issue for this Court's review, the question remains, as he identified in his initial brief, of

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1 The purpose of peremptory challenges, first and foremost, is to assure an impartial jury as guaranteed by the constitution. Gootee v. Clevinger, 778 So.2d 1005 (Fla. 5th DCA 2000) (Harris, dissenting).

whether the lower court correctly denied the defendant's cause challenge on Lapan. At trial, the State simply said Lapan was "imminently qualified" to sit as a juror. The State on appeal responds with only a bit more analysis by claiming that he was "qualified to serve because he indicated he could abide by the trial court's instructions." (Appellee's brief at p. 31, f.n. 4). But that response in light of his other strongly biased answers, fails to support the trial court's ruling. Bryant v. State, 656 So.2d 426, 428 (Fla.. 1995) (Trial court erred in denying cause challenge. "Although Pekkola stated that he could follow the court's instructions, his other responses were sufficiently equivocal to cast doubt on this.) As argued in the Initial Brief on pages 20-22, 24-26, Busby presented abundant reasons to justify excusing him for cause.

This Court should, as requested in the Initial Brief, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN EXCLUDING THE TESTIMONY OF MARTHA JOBSON, A SOCIAL WORKER, WHO WOULD HAVE TESTIFIED THAT BUSBY SUFFERED FROM POST-TRAUMATIC STRESS DISORDER, WHERE SUCH EVIDENCE WOULD HAVE SUPPORTED AND JUSTIFIED A DEFENSE OF SELF-DEFENSE, A VIOLATION OF THE FIFTH, SIXTH AND FOURTEEN AMENDMENTS TO THE UNITED STATES CONSTITUTION.

How do you explain a coldly premeditated murder? Busby, who looks like any other human being (except being very skinny and appearing very, very young (80 R 1302)), has a significant, fatal difference. He suffers from Post-traumatic Stress Disorder. The law recognizes that looks are deceiving and that people, because of past trauma in their lives, may harbor demons that can be unleashed by acts that, on the surface, are mild or even non threatening to a

normal person, e.g. State v. Hickson, 630 So.2d 172, 175 (Fla. 1993).

Traumatized persons look like any other man or woman on the street, but appearances are deceiving because they typically demonstrate a perpetual hyper vigilance, a heightened sensitivity of the world they live in. For them the placid lake hides an alligator ready to drag them under or a cotton mouth snake ready to strike.

The point of Busby's brief on this issue was that Nan Jobson's testimony would have explained why Busby, with his extraordinarily traumatized youth, saw the prison environment, with its real threats of rape and beatings for any inmate, as presenting an imminent threat to him. As discussed in the Initial Brief, prison life, even for the "normal" inmate is fraught with real dangers, some immediate, others lurking. For Busby prison life blended into a battlefield of constant, perpetual threats and terror, and it was one of constant, life threatening danger. And the combat analogy rings particularly true: a lurking danger with hours of boredom punctuated by moments of sudden, utter terror. Hence, while the law requires an imminent threat, it not be an immediate one. Instead, it recognizes that there are times and places and situations whose dangers are forever present for which sudden, utter violence can erupt. They are imminent simply because the defendant is in a place where people are willing to use violence suddenly and without provocation or warning.

The law also recognizes that there are people who, because of beatings, abuse, and other terrors, are particularly atuned to the nuances of their life that the average juror would miss. Recognizing these subtle clues allowed them to survive in their hostile world, but it also prompted them to strike out and back at their tormentors. Courts of this state have allowed jurors to hear explanations for apparently criminal acts because they may not understand why a person with PTSD, who appears normal, could do something so violent. Hickson, cited above, State v. Mizell, 773 So.2d 618, 621 (Fla. 1st DCA 2000). In this case, Jopson's testimony would have

assisted the jury to understand why Busby, who appeared so normal, could kill so coldly.

On page 38 of its brief, the State notes that "Busby's claim [of imminent threat] is refuted by the testimony of his expert that the victim's act in refusing to have oral sex with Appellant, immediately preceding the murder, would not have triggered the response that he was in imminent danger. (R 78: 1109)." This is what the prosecutor asked Ms. Jopson:

> Q. Now how about this for a trigger: Someone said to Mr. Busby, "No, I won't give you a blow job." Would that trigger what you are talking about here?
>
> A. I don't think - I don't think that. My understanding from - again, I haven't seen him since 1976 (sic) - but my understanding from him, in watching him grow up was that he was not a homosexual. And so I realize the prison system is different, but no I don't think it would trigger him.

(78 R 1109). That, of course, was the wrong question. The prosecutor should have asked if someone had demanded of Busby that he (Busby) "give him a blow job," would that have triggered the defendant. Instead, Jopson was asked if the defendant would be triggered if someone refused his request and not the more relevant inquiry of someone demanding a homosexual act from him. Jopson's response reflects the strangeness of the question to her. It was not so much that the person's refusal would trigger a murderous rage, but that Busby, because he was not homosexual, would not have it in the first place. Her response, therefore, hardly refutes her much stronger testimony and conclusion that the pervasive prison culture of sexual attacks could have triggered him.

> In my opinion he was never safe in most of his life. He just did not have a safe place to live. He wasn't

safe from his early childhood throughout his different foster care placements; and really for the first time in his life he found safety in the home of Reverend Busby.

Q. Okay. And for someone that has safety as an issue and as well has suffered sexual abuse as a child - I'm going to pose a hypothetical question to you - that if someone in that position had been placed in a prison setting and had been the subject of constant sexual harassment and possibly hearing the threat of being raped or being forced to submit to someone sexually , could that possibly be a trigger?

A. Yes, sir.

Q. And if somebody was triggered in that manner, would they interpret that possibly as an imminent threat?

A. Yes, sir.

Q. Even through a person that didn't suffer from post traumatic stress disorder might not interpret that the same way

A. That is correct.

(78 R 1105-1106).

Thus, refusing to let Busby present Nan Jopson's testimony was error, and this Court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE III

THE COURT ERRED IN ALLOWING STATE ATTORNEY INVESTIGATOR LISA LONG TO TESTIFY THAT SHE SAW BUSBY MAKE SOME HAND GESTURES DURING THE TESTIMONY OF CHARLES GLOBE, AND IT ALSO ERRED IN ALLOWING THE STATE TO READ, AS SUBSTANTIVE EVIDENCE OF GUILT, THE TESTIMONY OF ANDREW BUSBY WHEN HE TOOK THE STAND AFTER LONG ONLY TO EXPLAIN THE GESTURES, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS

The State, on page 42 of its brief, says that the trial court did not tell Busby the State would not use his in court testimony until after he had testified. "Thus any contention that Busby relied upon the trial court's assertion would be unfounded as occurring after his admitted testimony (compare R. 79:1223-1225 with R. 81:13493-1394)." First, Busby's damning testimony came out during the State's cross-examination, and the defendant vigorously objected to it (79 R 1224). At that point, the trial court merely confirmed what defense counsel would later assert, that what he said in the motion hearing would not and could not be used against him (80 R 1316-17). "The jury is not going to hear it, but it goes in the record and you have the right to ask." (79 R 1224). At what point the court said that is irrelevant because it merely confirmed the common, justified belief that what a defendant testifies about in a motion hearing cannot be used against him except to impeach him. It was, therefore, unfair for the trial court to later reverse course and let the State use the defendant's statements against him. On the same page, the State argue that Busby's Fifth Amendment rights evaporate "regarding actions that he voluntarily took in open court, but for which he had no constitutional right." Well, it is not so much what actions he voluntarily took that the defendant objects to, but his testimony that explained them. As to the latter, he has a

Fifth Amendment right for it to be used against him, as Simmons v. United States, 390 U.S. 377 (1968), Hayes v. State, 581 So.2d 121 (Fla. 1991), and the other cases cited in the Initial Brief on this point support.

Long's testimony of Busby's hand motions, on the other hand, was objectionable simply because it had no relevance. That is, she could testify about what she saw, but the jury had to speculate about its meaning, and more significantly if Globe saw it (which he denied (81 R 1411). Her testimony, therefore, was irrelevant, because it tended to prove or disprove nothing.

As to the State's short harmless error argument, Busby relies on his argument on this point in his Initial Brief.

ISSUE IV

THE COURT ERRED IN REFUSING TO GIVE BUSBY HIS DUE PROCESS RIGHT TO PRESENT HIS DEFENSE IN THE WAY HE CHOSE WHEN IT REFUSED TO LET HIS CO-DEFENDANT, CHARLES GLOBE, TESTIFY BEFORE THE JURY LIVE AND IN PERSON, BUT INSISTED HE DO SO ONLY BY VIDEOTAPE, A VIOLATION OF BUSBY'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS

The State's argument here claims that because Busby personally wanted the video shown instead of having Globe testify in person, he has waived the issue he now complains about. "As the above colloquy establishes, it was Busby's decision to present Globe's testimony via videotape. His change of mind now on appeal does not provide a basis for relief." (Appellee's brief at pp. 49-50). Busby's counsel on appeal and at trial have not change their minds. At trial defense counsel clearly said he wanted Globe

to testify in person, not by a videotape, and he never changed his mind on that point.

> MR. DOSS: Judge I object to that. I want Mr. Globe here. I want the jury to see what kind of person that we are dealing with. . . . I consider Mr. Globe an extremely intimidating man, that the jury will not get a full flavor of what is going on in that cell unless they are able to see him, hear him, look at him, have him look at them, and that they can understand what went on there . . . . And a videotape is not going to be able to convey that.

(79 R 1129-31).

Rather that listen to what Busby's lawyer wanted, the trial court went straight to Mr. Busby and negotiated with him. That was error. When a defendant has a lawyer, he speaks through counsel. See, Logan v. State, 846 So.2d 472 (Fla. 2003). The court should never have shunted Mr. Doss aside and spoken directly to the defendant. That was error because in this matter it was counsel's decision of how to defend Mr. Busby that was crucial, not what the defendant personally wanted.

On the merits, the State, on page 50 of its brief, says Busby's confrontation clause argument is without merit because Globe was his witness. But, if he was his witness, he should have been able to present him or have him testify as he wanted. That is, Globe should have testified in person, as defense counsel wanted, rather than by videotape as the prosecution suggested. In that sense, Globe was the prosecution's witness and not defense counsel's when he testified by videotape rather than in person. Without any valid reason for following the State's lead, the trial court simply erred in refusing to let defense counsel present his case as he had planned.

ISSUE V

THE COURT ERRED IN DENYING BUSBY'S MOTION TO SUPPRESS STATEMENTS HE MADE TO LAW ENFORCEMENT OFFICERS AFTER HE TOLD THEM HE DID NOT WANT TO TALK WITH THEM, A VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND HIS RIGHTS UNDER ARTICLE I, SECTION IX OF THE FLORIDA CONSTITUTION.

In his Initial Brief at pages 62-65, Busby applied the factors identified by the United States Supreme Court in Michigan v. Mosely, 423 U.S. 96 (1975) as relevant in determining if the police "scrupulously honored" his Fifth Amendment right to cutoff questioning. In its Answer Brief, the State mentions only one of them, the time lapse between the two sessions (Appellee's Brief at p. 55). It says nothing about any of the other critical considerations a reviewing court should consider.

On page 57 of hits brief it also contends that "The fact that Busby had previously declined to talk to the authorities about the murder does not give rise to a heightened waiver requirement, and Busby fails to cite any authority for his belief that a distinct standard is required." That is precisely what Michigan v. Mosely, with its list of factors and its "scrupulously honor" requirement establishes.

Finally, as to the harmlessness of the confession, the State's case for premeditation, and Busby's direct involvement in the murder, became significantly stronger after the jury heard what the defendant had said. Indeed, if we look at the State's case without those statements we have evidence that either Globe or Busby or both killed Ard, but we do not know which one actually committed the murder, or if the defendant simply happened to be at the wrong place at the wrong time. The statements also provide a crucial

motive for the apparently senseless killing. To say that no reasonable doubt exists to conclude what the jury heard Busby admit had no affect on their deliberations simply denies the obvious. Busby's confession was so important that the State vigorously defended its right to present it at trial, did so, and then used what the defendant had said in his closing argument (81 R 1490). The court's error in finding no Fifth Amendment problem was error and reversible error at that. This Court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VI

THE COURT ERRED IN ADMITTING, AS WILLIAMS RULE EVIDENCE THAT BUSBY WANTED TO KILL A ROBERTO ROSA AND ALPHONSO PALMER, A VIOLATION OF THE DEFENDANT'S CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR TRIAL.

The State's argument on this point does little to weaken Busby's contention that "the State simply had no need for this evidence, which had only a minimal relevance at best." (Initial Brief at p. 69). As such, and because the points he made in his brief adequately present the argument, Busby relies on what he said there to carry the day on this issue.

ISSUE VII

THE COURT ERRED IN ADMITTING A TRANSCRIPT OF BUSBY'S JULY 7, 2000 CONFESSION RATHER THAN THE ORIGINAL AUDIOTAPE OF THAT STATEMENT, A VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL.

The State, on page 69 of its brief, says that Inspector Schenck testified that "the transcript completely and accurately reflected the incriminating statements made by Appellant," contrary to what Busby said in his Initial Brief. First, although asked to make a detailed analysis of the transcript with the tapes (82 R 1552), he never did because by that time "I discovered that the tape had been separated from the file." (82 R 1553). And, moreover, the request to do the comparison had come about a year after the homicide (82 R 1553). Thus, we have no comparison because there simply was no way he could have said that the transcript accurately reflected what was on the now lost tape.

ISSUE VIII

THE COURT ERRED IN FINDING BUSBY MURDERED ELTON ARD IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, A VIOLATION OF THE DEFENDANT'S EIGHTH AMENDMENT RIGHTS.

Appellant relies upon his original arguments for this issue.

ISSUE IX

THE COURT ERRED IN REFUSING TO ADMIT SEVERAL EXHIBITS BUSBY OFFERED DURING THE PENALTY PHASE PORTION OF HIS TRIAL, WHICH WOULD HAVE HELPED THE JURY UNDERSTAND WHY HE HAD BEEN DIAGNOSED AS SUFFERING FROM POST TRAUMATIC STRESS DISORDER, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

This Court's opinion in Spencer v. State, 645 So.2d 377, 383-84 (Fla. 1994), controls this issue, as argued in the Initial Brief. Contrary to the State's claim on page 78 of its brief, it is "the issue" that it had the opportunity to cross-examine Nan Jobson, and rebut her testimony if it could. Moreover, there is no evidence that at the time Busby wrote the letters or made the videos he intended them to be self-serving for a penalty phase defense in a capital murder trial. Instead they were self-serving to the extent they helped mitigate a death sentence, which is the purpose of mitigating evidence. To blandly say a defendant cannot offer self-serving evidence is similar to saying the State cannot present prejudicial facts. Both assertions are wrong. State v. McClain, 525 So.2d 420 (Fla. 1988). Parties are supposed to defend or prosecute with evidence favorable to their side or damaging to the other. The State needs to present more justification for excluding this evidence than to say it was self-serving, particularly when the evidence Busby offered was written or produced years earlier and in a context completely foreign to a penalty phase hearing.

The State concludes by claiming that excluding the evidence was harmless error. First, that argument would have more strength if the jury had unanimously recommended death. As it was, one of the jurors would have voted for life, even knowing the defendant was under two life sentences for committing two murders. So, with at least one member of the jury unpersuaded that death was the appropriate sentence in light of the very heavy weight of the aggravation, this Court cannot say with the easy confidence required that excluding this mitigation would have had no effect on the jury's recommendation. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

This Court should reverse the trial court's sentence of death and remand for a new penalty phase hearing.

ISSUE X

THE COURT ERRED IN ADMITTING A LETTER BUSBY OSTENSIBLY WROTE TO CHARLES GLOBE BECAUSE ITS PREJUDICIAL VALUE SUBSTANTIALLY OUTWEIGHED ITS LIMITED RELEVANCE, A VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL.

The State, on page 83 of its brief, argues that "at no time did Appellant request that the trial court redact any portion of the letter that he believed to be unduly prejudicial (see R 82: 1581-1583), and he therefore defaulted upon the claim." That is what Busby said, "I am going to object as to the relevance of this, particularly in regard to the one that's been identified as being written by Andrew Busby. I don't think it has any relevance whatsoever. My recollection, this is a letter that is very explicit and sexual and lurid in nature; that it does nothing other than inflame the jury." Busby raises the same issue on appeal that he argued at trial: this evidence, whatever its logical relevance, is so inflammatory that its prejudicial value substantially outweighs its probative worth.

The State, on pages 82 and 83 of its brief, argues that section 90.403 Florida Statutes (2000) has no application to the penalty phase of a capital sentencing trial. The State never presented that argument at the trial level, and just as a defendant can only raise issues and arguments on appeal that he had presented to the trial court, the State is similarly limited. See, Cannady v. State, 620 So.2d 165 (Fla. 1993); State v. Dupree, 656 So.2d 430 (Fla. 1995); Section 924.051, Florida Statutes (2000).

Moreover, that is certainly a novel argument and this Court has applied Section 921.141 only to relax the confrontation problems occasionally presented by certain types of evidence. It has never relaxed the rules of relevancy to include gossip, innuendo, or victims' desire for the punishment a defendant should receive.

Windom v. State, 656 So.2d 420 (Fla. 1995). Indeed, the section itself limits its reach when it provides "Any such evidence which the courts deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statement." It we accept the State's claim, that section 921.141(1) negates any relevancy requirement, sentencing hearings will become little more than a black robed version of the National Enquirer, and True Detective. Sentencing hearings would be better held in the supermarket check-out line that in a courtroom. Fortunately, this Court has rejected that contention. Perry v. State, 801 So.2d 78, 90 (Fla. 2001) ("This Court has held that, to be admissible in the penalty phase, the State's direct evidence must related to any of the aggravating circumstances.")

This Court should, therefore, affirm the obvious, reject the State's argument on this point, and remand for a new sentencing hearing.

ISSUE XI

THE COURT ERRED IN SENTENCING BUSBY TO DEATH BECAUSE SECTION 921.141 FLORIDA STATUTES UNCONSTITUTIONALLY ALLOWED THE TRIAL COURT TO SENTENCING HIM TO DO SO WITHOUT, AMONG OTHER THINGS, A UNANIMOUS DEATH RECOMMENDATION FROM THE JURY.

The United States Supreme Court's opinion in Ring v. Arizona, 536 U.S. 584 (2002), will not go away, however much some may wish it to do so. Similarly, neither will the various opinions of members of this Court about the impact that case has on Florida's death penalty scheme. See Duest v. State, Case No. SC00-2366 (Fla. June 26, 2003). Busby raises this issue to preserve

it for review once the United States Supreme Court resolves how that case impacts the way we put people to death.

ISSUE XII

THE COURT ERRED IN ALLOWING THE STATE TO PRESENT EVIDENCE BEYOND THE FACT THAT BUSBY HAD TWO PRIOR FIRST-DEGREE MURDER CONVICTIONS IN SUPPORT OF THE PRIOR VIOLENT FELONY AGGRAVATOR, A VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

Appellant relies upon his initial arguments for this issue.

ISSUE XIII

THE TRIAL COURT ERRED IN REPEATEDLY INSTRUCTING THE JURY THAT THEIR RECOMMENDATION WAS JUST THAT, A RECOMMENDATION, A VIOLATION OF BUSBY'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

Appellant relies upon his initial arguments for this issue.

CONCLUSION

Based on the arguments presented here, the Appellant, Andrew Busby, respectfully asks this honorable Court to 1. Reverse the trial court's judgment and sentence and remand for a new trial. Or, 2. Reverse the trial court's sentence of death and remand for a new sentencing hearing before a jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to **CASSANDRA K. DOLGIN**, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050; and to appellant, **ANDREW DARRYL BUSBY**, #V03727, Florida State Prison, 7819 NW 288th Street, Raiford, FL 32026, on this date, August 25, 2003.

Respectfully submitted,

NANCY DANIELS
Public Defender
Second Judicial Circuit

_____

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Florida Bar No. **0271543**
301 South Monroe Street, Suite 401
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(850) 488-2458

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that pursuant to Rule 9.210(a)(2), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

_____

DAVID A. DAVIS

IN THE SUPREME COURT OF FLORIDA

ANDREW DARRYL BUSBY,

Appellant,

vs. **Case No. SC 02-1364**

STATE OF FLORIDA,

Appellee.

_____/

APPELLEE'S MOTION FOR REHEARING

Comes now Appellee, the State of Florida, by and through undersigned counsel, pursuant to Fla. R. App. P. 9.330, and hereby moves for rehearing from this Court's opinion dated November 4, 2004, which, as a matter of federal constitutional law adopted a per se rule of reversal error despite no showing of the denial of appellant's right to an impartial jury. The majority opinion overlooks the following:

I. Appellant alleged the denial of his federal constitutional right to an impartial jury, not that his rights under Florida statutory law had been abridged.

In Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), the United States Supreme Court decided the following issue:

> During the selection of the jury in his capital murder trial, petitioner Bobby Lynn Ross resorted to one of his peremptory challenges to

> remove a juror whom the trial court should have excused for cause under *Witherspoon v. Illinois, 391 U.S. 510 (1968)*. He claims that because of that fact the Sixth and Fourteenth Amendments to the United States Constitution require reversal of his conviction and sentence of death.

Id. at 83, 108 S.Ct. at 2275, 101 L.Ed.2d 80.

Before this Court, appellant raised the very same claim:

> THE COURT ERRED IN REFUSING TO GRANT BUSBY'S CAUSE CHALLENGES TO PROSPECTIVE JUROR KIM LAPAN, A FORMER GUARD OF DEATH ROW PRISONERS AND ONE WHO HAD A BIAS AGAINST THEM, WHICH *FORCED HIM TO USE A PEREMPTORY CHALLENGE TO KEEP HIM OFF HIS JURY, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.*

Initial Brief Of Appellant, at 19 (emphasis added). In addressing this issue in the argument portion of his brief, appellant focused solely upon his contention that venireman Lapan should have been struck for cause. Id. at 19-27. At the conclusion of that argument, appellant made it quite clear that the basis for his claim was the fact that he felt compelled to exercise one of his peremptory challenges to remove a venireman that he believed would otherwise have denied his federal constitutional right to an impartial jury. Id. at 27. Similarly, in his reply brief, appellant reiterated that the aforesaid was the basis for his claim:

> The issue presented here is quite simple: Did the court correctly deny Busby's cause challenge for prospective juror Lapan. If not, and if he preserved the issue, as required by Trotter v.

> State, 576 So. 2d 691 (Fla. 1990), reversal is automatic because he did not have the impartial jury guaranteed by the Sixth Amendment. Id. at 693; Gootee v. Clevinger, 778 So. 2d 1005 (Fla. 5th DCA 2000).

Reply Brief Of Appellant, at 2 (emphasis added).[1]

Accordingly, the majority opinion erroneously dismissed Ross, intertwining the distinctive federal constitutional claim with that requiring the interpretation of a state statutory right. In addressing the very claim raised by appellant, the United States Supreme Court unequivocally "rejecte[d] the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." Ross, 487 U.S. at 88, 108 S.Ct. at 2278, 101 L.Ed.2d 80. As that court stated, peremptory challenges "are one means to achieve the constitutionally required end of an impartial jury." United States v. Martinez-Salazar, 528 U.S. 304, 307, 120 S.Ct. 774, 777, 145 L.Ed.2d 792 (2000). Here, appellant failed to demonstrate that jurors Winston and Liebel, who he would

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[1]Because appellant's claim was premised upon federal constitutional law, the State only addressed the claim as raised, Answer Brief Of Appellee (hereinafter "AB"), at 31-32, also asserting that to hold that the Sixth Amendment right to an impartial jury is violated when a defendant uses a peremptory challenge to remove a venireman whom was erroneously not removed upon a strike for cause creates a new rule of constitutional law and is contrary to Ross. See AB, id. To the extent that the majority's opinion rests upon state law, a distinct claim not before it, this is improper, cf. State v. Baez, 2004 Fla. LEXIS 1989 *15 (No. SC02-1173) (Nov. 10, 2004) (Pariente, C.J., dissenting); Delissio v. Delissio, 821 So. 2d 350, 356 (Fla. 1st DCA 2002) (Browning, J., dissenting) (The "majority sua sponte injected an issue not raised by the parties, then impermissibly remade the parties' agreement on a basis not argued by the parties and, in so doing, denied the former wife due process."); see also Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla.) ("This Court's role after a death sentence has been imposed is 'review,' a process qualitatively different from sentence 'imposition.'"), cert. denied, 454 U.S. 1000 (1981). Rehearing is therefore warranted. Moreover, because the parties have not argued the state law issue, the State has not waived any argument as to that new issue. See infra, at 7-10.

have exercised additional peremptories upon to remove, were not impartial. Indeed, appellant made no such attempt before this Court. There is a presumption of a jury's impartiality. See, e.g., Rolling v. State, 695 So. 2d 278, 285 (Fla.), cert. denied, 522 U.S. 984 (1997); Zile v. State, 710 So. 2d 729, 735 (Fla. 4th DCA 1998) (a prospective juror is presumed impartial absent a showing to the contrary). Accordingly, appellant's use of a peremptory challenge to remove venireman Lapan, without a showing that the jury that actually sat was biased, did not abridge his Sixth Amendment right to an impartial jury. Ross, 487 U.S. at 88, 108 S.Ct. at 2278, 101 L.Ed.2d 80; see also Martinez-Salazar, id.

The majority's reliance upon Trotter v. State, 576 So. 2d 691 (Fla. 1990), see Busby v. State, 2004 Fla. LEXIS 1925, *19-20 (No. SC02-1364) (Fla. Nov. 4, 2004), demonstrates its failure to distinguish between the claims. Trotter first addressed the federal Sixth Amendment right to an impartial jury, and then considered state law pertaining to the statutory right to use peremptory challenges. Id. at 692. Applying federal law -- the issue presented here -- this Court pursuant to Ross held that the defendant made no showing that a biased juror was seated. Trotter, 576 So. 2d at 692-693. Moreover, state constitutional law, contrary to the majority's opinion, see Busby, 2004 Fla. LEXIS 1925, *32, is consistent with Ross. As this Court recognized in State v. Neil, 457 So. 2d 481 (Fla. 1984),

> Article I, section 16 of the Florida Constitution guarantees the right to an impartial jury. The right to peremptory challenges is not of constitutional dimension. The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury.

Id. at 486. "The right to an impartial jury guaranteed by article I, section 16, is best safeguarded not by an arcane maze of reversible error traps, but by reason and common sense." Anderson v. State, 711 So. 2d 230, 231 (Fla. 4th DCA 1998) (reviewing a Batson

claim). Consistent with the foregoing, "[a]ny claim that the jury was not impartial, therefore, must focus not on the [venireman improperly not removed for cause], but on the jurors who ultimately sat." Ross, 487 U.S. at 86, 108 S.Ct. at 2277, 101 L.Ed.2d 80. Thus contrary to the majority's conclusion, Busby, 2004 Fla. LEXIS 1925, * 33, *42, appellant received precisely that guaranteed by the Sixth Amendment of the United States Constitution and Art. I, § 16 of the Florida Constitution -- an impartial jury.[2]

2Indeed, the majority of jurisdictions, as noted by the dissent, see Busby, 2004 Fla. LEXIS 1295, *55 & n.23 (Bell, J., dissenting), have rejected the proposition that the guarantee of an impartial jury includes entitlement to a jury of a particular composition. In addition to those cases cited by the dissent, state decisions from Maryland, Oregon, and Wyoming also are in accord. Grandison v. State, 670 A.2d 398, 417-418 (Md. 1995); State v. Barone, 969 P.2d 1013, 1018-1019 (Or. 1998); Klahn v. State, 96 P.3d 472, 483 (Wyo. 2004), respectively.

On the other hand, the majority's reliance upon decisional law from California, Colorado, Connecticut, Hawaii, Kentucky, Louisiana, Maine, Massachusetts, Montana, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Texas, Vermont, Virginia, West Virginia, and Wyoming is misplaced, for the following reasons:

First, a number of those decisions turned on procedural due process or state statutory and/or state constitutional provisions, and not the defendant's Sixth Amendment right to an impartial jury as presented here. See People v. Lefebre, 5 P.3d 295, 304-305 (Colo. 2000); State v. Esposito, 613 A.2d 242, 248, 249 (Conn. 1992); State v. Kauhi, 948 P.2d 1036, 1041 (Haw. 1997); Thomas v. Commonwealth, 864 S.W.2d 252, 259 (Ky. 1993), cert. denied, 510 U.S. 1177 (1994); State v. Cross, 658 So. 2d 683, 686 (La. 1995); Commonwealth v. Auguste, 605 N.E.2d 819, 823-824 (Mass. 1992); State v. Freshmen, 43 P.3d 968, 975 (Mont. 2002) (citing State v. Good, 43 P.3d 948, 956 (Mont. 2002); People v. Cahill, 809 N.E.2d 561, 577-578 (N.Y. 2003); State v. Conner, 440 S.E.2d 826, 835 (N.C. 1994); State v. Tyler, 553 N.E.2d 576, 586 (Ohio), cert. denied, 498 U.S. 951 (1990); Johnson v. State, 43 S.W.3d 1, 13-14 (Tex. Crim. App. 2001); State v. Phillips, 461 S.E.2d 75, 93 (W. Va. 1995);

Secondly, decisions that address the Sixth Amendment issue were decided prior to Ross or applied or relied upon cases applying pre-Ross law. See People v. Crittenden, 885 P.2d 887, 906-907 (Cal. 1994), cert. denied, 516 U.S. 849 (1995); Fuson v. State, 735 P.2d 1138, 1139-1140 (N.M. 1987); (continued...)

As the Court's opinion now stands, the state statutory right to peremptory challenges has been "constitutionalized" -- contrary to both state and federal constitutional law. Rehearing is warranted on this basis.

II. Preserving a claim of an improper denial of a motion to remove a venireman for cause -- through identification of another venireman that defendant did not want to serve on the jury -- was never intended to constitute prejudice per se.

A criminal defendant has "a right to an impartial jury, but [is] not entitled to any particular persons as jurors." M'Rae v. State, 57 So. 348 (Fla. 1911). Thus as stated in Young v. State, 96 So. 381 (Fla. 1923), "[t]he purpose [of peremptory challenges] is that there may be full assurance of the constitutional guaranty of a trial by an impartial jury." Id. at 383. That is,

> the right is given in aid of the party's interest to secure a fair and impartial jury, not for creating ground to claim partiality which but for its exercise would not exist.[11] It does not follow that by using the right as he pleases, he obtains the further one to repudiate the consequences of his own choice.

2(...continued)
Commonwealth v. Impellizzeri, 661 A.2d 422, 426-427 (Pa. 1995); State v. Mantelli, 621 A.2d 222 (Vt. 1992); David v. Commonwealth, 493 S.E.2d 379 (Va. 1997).

Next, one decision, also pre-Ross, did not identify the basis for the claim involving the use of the peremptory nor addressed the issue of prejudice. State v. Albano, 111 A. 753 (Me. 1920); and

Lastly, the per se reversible error rule applied in Patterson v. State, 691 P.2d 253 (Wyo. 1984) cited by the majority, Busby, 2004 Fla. LEXIS 1295, *40 n.14, was subsequently repudiated in Klahn, 96 P.3d at 483.

> [11] The right is in the nature of a statutory privilege, variable in the number of challenges allowed, which may be withheld altogether without impairing the constitutional guaranties of "an impartial jury" and a fair trial. *Stilson v. United States*, 250 U.S. 583, 586, quoted in *United States v. Wood*, 299 U.S. 123, 145.

Frazier v. United States, 335 U.S. 497, 505, 69 S.Ct. 201, 206, 93 L.Ed. 187 (1948). This Court recognized as much in Rollins v. State, 148 So. 2d 274 (Fla. 1963). In Rollins, the Court looked to the reasons that counsel would have peremptorily removed that juror, stating that the reasons given did not render the "venireman legally objectionable or unqualified to serve," having assumed that a challenge for cause was improperly denied and upon identification of a venireman that counsel would have exercised a peremptory challenge had he an additional one. Id. at 276; see also Longshore v. Fronrath Chevrolet, Inc., 527 So. 2d 922, 924 (Fla. 4th DCA 1988) (recognizing the requirement under Rollins that a juror for whom defendant sought an additional peremptory challenge must have been subject to cause removal).

If the mere act of identifying the juror were sufficient in itself to establish reversible error -- i.e., preservation of the alleged error constitutes the error itself -- there simply would have been no reason for the Court to look to the reasons for the proposed peremptory challenge and to consider whether the juror sought to be removed improperly sat. See also Knowles v. State, 632 So. 2d 62, 65 (Fla. 1993) (in addressing lack of preservation as to the jury issue, the Court observed not only that the defendant did identify a juror he wanted off the jury, but also that he did not "claim that any of the jurors seated were biased."). Rollins and Knowles demonstrate that there is a distinction between a violation of the right to an impartial jury and preserving a claim of loss of a peremptory challenge due to an improper denial of a strike for cause.

Nor is the Court's reliance upon Trotter persuasive on the issue. Cases relied upon in Trotter, including Hill v. State, 477 So. 2d 553 (Fla. 1985) and Moore v. State, 525 So. 2d 870 (Fla. 1988), see Trotter, 576 So. 2d at 693 n.6, were decided prior to Ross. Thus in respect to protecting a defendant's constitutional right to an impartial jury, the focus upon the venireman who should have been removed for cause as opposed to the jury that actually sat, has nothing to do with protecting the right to an impartial jury. As stated, these issues are distinct, and the per se reversible error rule in connection with a defendant's use of a peremptory challenge, as discussed infra, at 12-17, provides defendants with an unwarranted windfall.

To the extent, however, that state law does require per se reversal to vindicate defendant's inability to remove *any* venireman due to the lack of additional peremptory challenges -- irrespective of bias -- such a rule creates the right to a jury made up of particular individuals and is contrary to the purpose behind peremptory challenges in guaranteeing defendant's right to an impartial jury. Arguably, then, the inability of a defendant to remove any venireman with a peremptory challenge would violate his right to an "impartial jury" as interpreted by this Court, irrespective of the reason for a lack of additional peremptory challenges -- including, for example, a statutory limit on the number of peremptories. Cf. Busby, 2004 Fla. LEXIS 1295, *42 ("While not expressly provided for in Florida's Constitution, peremptory challenges are a necessary tool for achieving the constitutional right of a trial by an impartial jury."). Surely the Court did not intend this result. Rehearing is thus warranted.

III. To the extent that the use of a peremptory challenge to remove a venireman who should have been struck for cause constitutes per se reversible error as a matter of state law[3], the rule permits the violation of federal and state

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3The State does not concede this point. See supra, at 9-10.

constitutional law and also accords a criminal defendant an unwarranted windfall.

A. Violation of Batson v. Kentucky and State v. Neil / State v. Slappy

The right to the exercise of peremptory challenges is a matter of state statutory law, and just as the State is prohibited from exercising its peremptory challenges in a discriminatory fashion, so too is the criminal defendant. Georgia v. McCollum, 505 U.S. 42, 59, 112 S.Ct. 2348, 2359, 120 L.Ed.2d 33 (1992).

> Under Florida law, a party's use of peremptory challenges is limited only by the rule that the challenges may not be used to exclude members of a "distinctive group." See State v. Neil, 457 So. 2d 481 (Fla. 1984) (holding that race-based peremptory challenges violate the defendant's right to an impartial jury); State v. Alen, 616 So. 2d 452 (Fla. 1993) (same as to ethnicity); Abshire v. State, 642 So. 2d 542 (Fla. 1994) (same as to gender). Both parties have the right to peremptorily strike "persons thought to be inclined against their interests." Holland v. Illinois, 493 U.S. 474, 480, 107 L. Ed. 2d 905, 110 S. Ct. 803 (1990).

San Martin v. State, 705 So. 2d 1337, 1343 (Fla. 1997), cert. denied, 525 U.S. 841 (1998).

As the Court's opinion hereby stands through the operation of the per se reversible error rule, a defendant can obtain a new trial irrespective that one or more jurors he would have exercised a peremptory challenge against was based upon a discriminatory purpose. And because the identified juror is not removed where the request for an additional peremptory is denied -- thus setting the

stage for reversible error -- there exists no mechanism by which the State can challenge the propriety of the proposed challenge.[4]

Just as the use of peremptory challenges "is attributable to state action" on the trial level, McCollum, 505 U.S. at 54-55 & n.10, 112 S.Ct. at 2356-2357 & n.10, 120 L.Ed.2d 33, it is beyond dispute that the per se reversible error now accorded by this Court and previously by the district courts of appeal, see infra, at 15-16 n.6, involving a requested peremptory challenge based upon a discriminatory purpose that would have been exercised but for lack of availability, similarly would constitute state action violative of state and federal constitutional provisions.

As a consequence of the foregoing, the burden of the denial of a defendant's per se right to an additional peremptory is shifted to the State which is denied the "broad leeway in allowing parties to make a prima facie showing that a 'likelihood' of discrimination exists." State v. Slappy, 522 So. 2d 18, 22 (Fla.), cert. denied, 487 U.S. 1219 (1988). The State doubts that the Court intended that a criminal defendant automatically obtain a new trial irrespective of the potential unconstitutional use of peremptory challenges. Rehearing is thus warranted.

B. Unjustified Windfall

Without having to demonstrate actual prejudice, a criminal defendant is awarded a new trial if the trial court erred in not removing the venireman subject to a strike for cause where defendant removed the venireman with a peremptory challenge, used the remaining challenges afforded under § 913.03, and then

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4Because the State is unable to challenge a proposed peremptory challenge, thereby relieving defendant of what would otherwise be his burden to come forward with a neutral reason for using such a strike, there is no basis for applying the rule that the actual exercise of a peremptory challenge is presumptively nondiscriminatory. Rather, these circumstances are akin to when there is a failure to offer any reason for the strike, which is inadequate to sustain the strike. See Dorsey v. State, 868 So. 2d 1192, 1201-1202 (Fla. 2003).

requested but did not receive an additional peremptory to remove an identified potential juror. This windfall to the defendant derives from an elevation of form over substance, and is unfounded under Florida law.

In determining whether per se reversible error is warranted, this Court has always looked to the fairness of the proceedings. As explained in State v. Schopp, 653 So. 2d 1016 (Fla. 1995):

> We explained in *DiGuilio* that a defendant has a constitutional right to a fair trial free of harmful error. This right has been recognized by the legislature in section 924.33, Florida Statutes (1993), which provides that harmless error analysis is applicable to all judgments.[5] While the courts may establish a rule of per se reversal for certain types of errors, *a per se rule is appropriate only for those errors that always vitiate the right to a fair trial and therefore are always harmful*. 491 So. 2d at 1134-35.

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[5] Section 924.33, Florida Statutes (1993), provides:

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

Id. at 1020 (emphasis added). See also United States v. Hasting, 461 U.S. 499, 508-509, 103 S.Ct. 1974, 1980, 76 L.Ed.2d 96 (1983) ("[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect

trial, and that the Constitution does not guarantee such a trial.") (discussing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

Without having to demonstrate that he was compelled to accept as a juror someone biased against him, the fairness of appellant's proceedings literally are irrelevant for the sake of a statutory right to a number of peremptory challenges intended in themselves to guarantee the fairness of the proceedings. Most states have rejected this very proposition. See Busby, 2004 Fla. LEXIS 1295 *55 (Bell, J., dissenting) (citing cases). This Court's opinion simply cannot be reconciled with those cases holding that even some constitutional violations -- those not infringing upon the fairness of the trial -- can be harmless. See Arizona v. Fulminante, 499 U.S. 279, 309-310, 111 S.Ct. 1246, 1264-1265, 113 L.Ed.2d 302 (1991) (unconstitutional admission of coerced confession at guilt stage); Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) (unconstitutionally broad jury instructions at sentencing stage); Satterwhite v. Texas, 486 U.S. 249, 258, 108 S.Ct. 1792, 1798, 100 L.Ed.2d 284 (1988) (unconstitutional admission of evidence at sentencing stage).

Notwithstanding the windfall accorded appellant, the majority proclaims that "[c]ontrary to the characterization cast by the dissent, the Trotter standard has not thrown wide open the doors to multitudes of defendants seeking a new trial because of erroneously denied cause challenges." Busby, 2004 Fla. LEXIS 1925, *29-30. As the dissent points out, however, the Court's consideration is limited only to those cases before it, without regard to those brought in the district courts of appeal. Id. at *66 & n.26. Indeed, the number of cases citing Trotter currently total 115[5], whereas relief has been granted in at least 28, and does not take into consideration cases seeking the same relief based upon case law

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5This number was obtained from using the "Shepard's" service available through the Lexis Nexis legal research system.

relied upon in Trotter.[6] The majority opinion makes no reference to or otherwise acknowledges the actual extent to which such per se reversal has been sought absent any showing of prejudice.

Beyond the potential for its discriminatory use, the per se reversal error rule would permit even greater mischief: superfluous claims of ineffective assistance of counsel based solely upon counsel's failure to preserve a claim of the wrongful denial of an additional peremptory challenge. That result runs contrary to this

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6Peters v. State, 874 So. 2d 677 (Fla. 4th DCA 2004); Bell v. State, 870 So. 2d 893 (Fla. 4th DCA 2004); Rodriguez v. State, 816 So. 2d 805 (Fla. 3d DCA 2002); Rodas v. State, 821 So. 2d 1150 (Fla. 4th DCA 2002); Taylor v. State, 796 So. 2d 570 (Fla. 2d DCA 2001); Mobley v. State, 774 So. 2d 782 (Fla. 2d DCA 2000); Wells v. State, 766 So. 2d 1129 (Fla. 2d DCA 2000); Shannon v. State, 770 So. 2d 714 (Fla. 4th DCA 2000); Gootee v. Clevinger, 778 So. 2d 1005 (Fla. 5th DCA 2000); Atkins v. State, 736 So. 2d 719 (Fla. 2d DCA 1999); James v. State, 731 So. 2d 781 (Fla. 3d DCA 1999); Straw v. Associated Doctors Health and Life, 728 So. 2d 354 (Fla. 5th DCA 1999); Ferguson v. State, 693 So. 2d 596 (Fla. 2d DCA 1997); Lazana v. State, 666 So. 2d 588 (Fla. 2d DCA 1996); Hall v. State, 682 So. 2d 208 (Fla. 3d DCA 1996); Jones v. State, 660 So. 2d 291 (Fla. 2d DCA 1995); Perea v. State, 657 So. 2d 8 (Fla. 3d DCA 1995); Jones v. State, 652 So. 2d 967 (Fla. 3d DCA 1995); Davis v. State, 656 So. 2d 560 (Fla. 4th DCA 1995); Williams v. State, 638 So. 2d 976 (Fla. 4th DCA 1994); King v. State, 622 So. 2d 134 (Fla. 3d DCA 1993); Hagerman v. State, 613 So. 2d 552 (Fla. 4th DCA 1993); Diaz v. State, 608 So. 2d 888 (Fla. 3d DCA 1992); Canty v. State, 597 So. 2d 927 (Fla. 3d DCA 1992); Street v. State, 592 So. 2d 369 (Fla. 4th DCA 1992); Henry v. State, 586 So. 2d 1335 (Fla. 3d DCA 1991); Dellmar v. State, 586 So. 2d 513 (Fla. 3d DCA 1991); White v. State, 579 So. 2d 784 (Fla. 3d DCA 1991).

And prior to Trotter, reversal was automatically granted on numerous occasions pursuant to the authority from which Trotter derived -- Hill, 477 So. 2d at 556 and/or Leon v. State, 396 So. 2d 203 (Fla. 3d DCA 1981). See, e.g., Blye v. State, 566 So. 2d 877, 877-878 (Fla. 3d DCA 1990); Tenon v. State, 545 So. 2d 382, 384, 385 (Fla. 1st DCA 1989); Ortiz v. State, 543 So. 2d 377, 378-379 (Fla. 3d DCA 1989); Farias v. State, 540 So. 2d 201, 203 (Fla. 3d DCA 1989); Price v. State, 538 So. 2d 486, 489 (Fla. 3d DCA 1989); Longshore v. Fronrath Chevrolet, Inc., 527 So. 2d 922, 924-925 (Fla. 4th DCA 1988); Smith v. State, 516 So. 2d 43, 44 (Fla. 3d DCA 1987); Auriemme v. State, 501 So. 2d 41, 43-44 (Fla. 5th DCA 1987); Smith v. State, 463 So. 2d 542, 545 (Fla. 5th DCA 1985).

Court's decision in Phillips v. State, 2004 Fla. LEXIS 1808 *12-13 (No. SC00–2248) (Fla. Oct. 14, 2004), rejecting a claim of ineffective assistance premised upon counsel's failure to exercise his two remaining peremptory challenges. Additionally, to protect what would otherwise be a fair trial, the State must now anticipate such per se reversible error any time that a defendant's strike for cause is denied, thus exercising its own. This inevitable result has the very effect that the majority sought to avoid: "amplify[ing] the ability of one party to use peremptory challenges at the expense of the other in contravention of the plain language of *section 913.08*, which grants each party to a criminal proceeding the same number of peremptory challenges." Busby, 2004 Fla. LEXIS 1295 *27.

To avoid the windfall intrinsic to the Court's per se reversible error rule, and in recognition that the right to an impartial jury and the state statutory right to use a specified number of peremptory challenges present distinct issues, effect can be given to the latter by requiring that the defendant come forward with a nondiscriminatory basis in support of his request for additional peremptory challenges. Such a procedure surely is consonant with the role peremptory challenges play in removing undesirable but not necessarily legally objectionable veniremen. Under those circumstances, harmful error would result from the denial of an additional peremptory challenge to remove the "objectionable" but not "incompetent" juror when a strike for cause was erroneously denied.

Based upon the foregoing, because per se reversible error provides an unwarranted windfall, rehearing should be granted.

CONCLUSION

The State respectfully requests that the Court consider the arguments and authority presented by the State overlooked in the majority opinion, withdraw its decision granting relief, and affirm appellant's judgment of conviction and sentence.

Respectfully submitted,

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Undersigned counsel hereby certifies that a true and correct copy of the foregoing was mailed, postage prepaid, on this ____ day of November, 2004, to:

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CASSANDRA K. DOLGIN

IN THE SUPREME COURT OF FLORIDA

ANDREW DARRYL BUSBY,

Appellant,

v. CASE NO. **SC92-1364**

STATE OF FLORIDA,

Appellee.
_____/

RESPONSE TO APPELLEE'S MOTION FOR REHEARING

The Appellant, Andrew Busby, respectfully asks this honorable Court to deny the State's motion for rehearing. It says nothing that should change the decision in this case, and the court's opinion and the dissent clearly indicate this Court has seriously and thoroughly considered the problems presented by this case. Nonetheless, being given the opportunity to defend this Court's opinion, he provides additional grounds for this Court to deny the State's motion:

1. First, Busby did not receive the fair and impartial trial guaranteed by the United States and Florida Constitutions and other state law. He did not because the court forced him to use a peremptory challenge on an objectionable juror, and that forced im to accept objectionable jurors that he said he would have specifically challenged had he been given extra peremptory challenges. The State's complaint relegates the peremptory challenge to voodoo, something that has no value to guaranteeing a fair trial. Accordingly, only if a juror sat who should have been excused for cause can a defendant claim the court denied him his fair trial. That is not the law, either in the federal or state systems.

2. The State complains in part one of its rehearing that this Court relied on State law to justify, in part at least, its decision in this case, even though Busby never did. To the contrary, he certainly relied on it in his argument. That is, Trotter v. State, 576 So.2d 691 (Fla. 1990) is clearly a creature of state law, and it has no counterpart, to date, in the federal system or the United States Constitution. In that sense, this Court, as it has done with the racially discriminatory use of peremptory challenges, has taken the lead in this area of the law. See, State v. Neil, 457 So.2d 481 (Fla. 1984).

The State, on page 4 of its motion, says "Accordingly, appellant's use of a peremptory challenge to remove Lapan, without a showing that the jury that actually sat was biased, did not abridge his Sixth Amendment right to an impartial jury. Ross [v. Oklahoma, 487 U.S. 81,. 88, 108 S.Ct. 2273, 2278, 101 L.Ed.2d 80 (1987)] . . ." The State's problem arises from making the United States Supreme Court's decision in Ross v. Oklahoma, 487 U.S. 81 (1987) say more than it does. In that case, the trial court improperly refused to excuse a prospective juror, and that forced the defendant to use one of his peremptory challenges. He later exhausted all of them, but, significantly, did nothing more. He never requested more peremptory challenges, nor did he say whom he would have used them on. Thus, although he may have had to improperly use one of his discretionary challenges he still had the fair and impartial jury guaranteed by the United States Constitution. The nation's high court correctly asked, in effect, "so what if he had to use a peremptory to excuse a prospective juror who should have been excused for cause?" Ross got all the constitution required, a fair and impartial jury. How it was achieved - either by cause and/or peremptory challenges, or an Ouija board, was unimportant. They are a means to achieve the end of an impartial jury. "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." Id. at 88.

Significantly, therefore, Ross never addressed the problem Busby presented: a defendant who objects to the impartiality of his jury. Busby, slip opinion at p. 24, footnote 13. *Unlike Ross, he did* not stand by silently after he had exhausted his peremptory challenges. He requested more and then said upon whom he would have used them on. Busby did that, as required by Trotter, by not only exhausting his peremptory challenges, but requested more. Not only that, he specifically said he would have used them no Winston and Liebel. So, in no uncertain terms, Busby has said that he did not have a fair and impartial trial constitutionally guaranteed because those two sat. Ross never did that, and it was validly assumed in his case that because he stood silent when he could have and should have objected, he had no problems with his jury.

3. But that leads to the State's second problem. It seem to think that the peremptory challenge has no value in guaranteeing a fair and impartial trial. As long as a no juror sat who should have been excused for a legally recognized cause, Busby had a fair trial. That, however, is not the law, either under the United States or Florida Constitutions. While not a right under either fundamental law, Ross, at 88, they are a means to insure a fair trial. If they are the only way, besides the cause challenge (That is, Ouija boards are impractical), to do that, then requiring Busby to use one on a prospective juror who should have been excused for cause becomes reversible error if the defendant requests more and says whom he would use them on.

That is, Busby would have been denied a fair trial, as the State says, a juror who should have been excused for cause sat. But he would also have been denied a fair trial if a juror sat who he would have peremptorily challenged if the court had not forced him to use a peremptory challenge on an objectionable juror.

Now the State points out, correctly, that if that were the case, the defendant should have an unlimited number of peremptory challenges. And if we lived in a perfect world with unlimited resources and time, perhaps that would be true. But we are lawyers

and judges who must exist with limitations, but who must none the less do society's business. Time and judicial economy, at some point, become legitimate considerations. So, the law, in a course way, provides for a fair trial by means of the unlimited number of cause challenges. The peremptory challenge further insures that goal by allowing a refining, or fine tuning, of the jury selection to get, if not a perfect jury, then at least a fair one. Would we still have a constitutionally acceptable body of citizens without them? Hard to say, but significantly no court or legislature has seriously considered eliminating them. See, Busby, slip opinion at p. 51. Roger Hochman, "Abolishing the Peremptory Challenge: The Verdict of Emerging Case Law," 17 Nova Law Review, 1367, 1402-1403 (1993). The utility of the peremptory challenge, while remaining as elusive as justice, is real and firmly entrenched both at the state and federal levels.

4. The State claims the defendant will gain a windfall by the Court's ruling in this case. (Appellee's motion at pp. 10-17). Not so. There is a mechanism already in place for any party to challenge the improper use of peremptory challenges, and it can easily and naturally apply to the situations envisioned by the State. State v. Johans, 613 So.2d 1319 (Fla. 1993). If the State thinks the defendant wants more peremptory challenges so he or she can use them on a prospective jury for an improper reason, it can raise its concerns and the defendant can provide his reasons for summarily striking him or her. Nothing is hard about that, and the defendant gets no windfall.

5. Finally, the State says the majority's opinion will permit the even greater mischief of "superfluous claims of ineffective assistance of counsel based solely upon counsel's failure to preserve a claim of the wrongful denial of an additional peremptory challenge." (Appellee's motion at p. 16). But this Court has enough experience in dealing with superfluous claims to separate the legal wheat from the superfluous chaff, as it obviously did in Phillips v. State, 29 Fla.L.Weekly S585 (Fla. Oct. 14, 2004), which the State cited supporting its claim on this point.

6. Busby, therefore, asks this honorable Court to deny the State's motion for rehearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **CASSANDRA K. DOLGIN** and **CAROLYN M. SNURKOWSKI**, Assistant Attorneys General, the Capitol, Tallahassee, FL 32399-1050, on this date, November 29, 2004.

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Supreme Court, U.S.
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No. 04-1499
(CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,
Petitioner,

v.

ANDREW DARRYL BUSBY,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Florida

PETITIONER'S REPLY TO "BRIEF IN OPPOSITION FOR THE RESPONDENT"

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The Florida Supreme Court's Decision Upon The Federal Constitutional Claim Respondent Had Presented Below, That The Trial Court's Failure To Remove A Venireman Subject To A Strike For Cause And Defendant's "Loss" Of A Peremptory Challenge Used To Remove That Venireman Violated His Right To An Impartial Jury, Vests Jurisdiction In This Court 2

II. The Florida Supreme Court's Holding That A Defendant Has An Unqualified Right To Peremptory Challenges To Effectuate his Constitutional Right To An Impartial Jury Permits The Unconstitutional Discriminatory Use Of Peremptory Challenges 5

CONCLUSION 7

TABLE OF AUTHORITIES

Federal and State Constitutional and Statutory Provisions

U.S. Const. amend. VI 1, 3, 4, 7

U.S. Const. amend. XIV
(Equal Protection Clause) 6

28 U.S.C. § 1257(a) 5

Fla. Const. Art. I, § 16 ..... 1, 2 n.1, 4

Fla. Stat. § 913.08 ..... 2 n.1

Federal Cases

Batson v. Kentucky,
476 U.S. 79 (1986) 6

Michigan v. Long,
463 U.S. 1032 (1983) 5

Ohio v. Reiner,
532 U.S. 17 (2001) 5

Ross v. Oklahoma,
487 U.S. 81 (1988) 4, 5

United States v. Martinez-Salazar,
528 U.S. 304 (2000) 4-5

State Cases

Brown v. State,
538 So. 2d 833 (Fla. 1989) 4

Foster v. State,
778 So. 2d 906 (Fla. 2000) 4

Marshall v. State,
854 So. 2d 1235 (Fla. 2003) 4

Powell v. Allstate Ins. Co.,
652 So. 2d 354 (Fla. 1995) 4

Rolling v. State,
695 So. 2d 278 (Fla. 1997) 4

State v. Alen,
616 So. 2d 452 (Fla. 1993) 4

State v. Neil,
457 So. 2d 481 (Fla. 1984) 4

No. 04-1499

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,
Petitioner,

v.

ANDREW DARRYL BUSBY,
Respondent.

In his response to the Petition For Writ Of Certiorari, respondent asserts that this Court should decline to exercise its jurisdiction on the basis that the Florida Supreme Court's decision rested upon an independent and adequate state ground. "Brief In Opposition For The Respondent (hereinafter "Response"), at 2-5. Respondent fails to acknowledge or otherwise discuss, however, that the argument he presented to the state court rested upon his Sixth Amendment right to an impartial jury. Moreover, the Florida constitutional right to an impartial jury has always been interpreted *in pari materia* with the Sixth Amendment to the United States Constitution. Respondent further opposes the grant of certiorari review on the basis that state law provides a mechanism for inquiring into the propriety of a peremptory challenge. Id. at 6-7. Florida law under Busby, however, now provides a defendant with per se reversible error upon the projected use of a peremptory challenge on a discriminatory basis. The State briefly addresses each of respondent's contentions below.

I.

The Florida Supreme Court's Decision Upon The Federal Constitutional Claim Respondent Had Presented Below, That The Trial Court's Failure To Remove A Venireman Subject To A Strike For Cause And Defendant's "Loss" Of A Peremptory Challenge Used To Remove That Venireman Violated His Right To An Impartial Jury, Vests Jurisdiction In This Court.

The Florida Supreme Court's majority opinion concluded that "peremptory challenges are fundamental to each party's ability to realize the constitutional guarantee of trial by an impartial jury." App. at A-14 n.8. Respondent does not dispute that a conflict exists amongst the state high courts concerning whether the "loss" of a peremptory challenge provided under state law upon an erroneous denial of a strike for cause constitutes a denial of the constitutional right to an impartial jury requiring automatic reversal. Instead, without any acknowledgment of the federal constitutional basis for relief that respondent himself had raised before the Florida Supreme Court, respondent asserts that this Court should reject the petition because the state court's decision rests on Florida law.[1]

In his opening brief to the Florida Supreme Court, respondent raised the impartial jury issue as follows:

---

[1] As demonstrated below, Busby did not argue to the state supreme court that he had been denied his statutory right to peremptory challenges or that his right to an impartial jury under the Florida Constitution accorded him greater protections than that provided under the federal constitution. Indeed, review of respondent's state appellate brief and reply brief reflects absolutely no citation to the relevant state law provisions, Fla. Stat. § 913.08 or Fla. Const. Art. I, § 16. Compare Appendix To Petition (hereinafter "App."), at A-58, A-229, respectively.

> The court erred in refusing to grant Busby's cause challenges to prospective juror Kim Lapan, a former guard of death row prisoners and one who had a bias against them, which forced him to use a peremptory challenge to keep him off his jury, *a violation of his Fifth, Sixth, and Fourteenth Amendment rights*.

App. at A-73 (emphasis added). Busby relied upon his federal constitutional right to an impartial jury, and cited state appellate decisions interpreting that right. Id. at A-78-80. The State certainly understood respondent's claim as arising under the Sixth Amendment and addressed it as such. Id. at A-170-171. Busby made no attempt to correct the State's now supposed mistaken understanding. Instead, that Busby repeated the federal basis of his argument in his reply brief to the Florida Supreme Court renders the position now taken before this Court disingenuous:

> The issue presented here is quite simple: Did the court correctly deny Busby's cause challenge for prospective juror Lapan. If not, and if he preserved the issue, as required by Trotter v. State, 576 So. 2d 691 (Fla. 1990), reversal is automatic because he did not have the *impartial jury guaranteed by the Sixth Amendment*. Id. at 693; Gootee v. Clevinger, 778 So. 2d 1005 (Fla. 5th DCA 2000).

App. at A-231 (emphasis added); see also id. at A-232 ("Thus, if, because the court wrongly forced Busby to exercise a peremptory challenge on Lapan, the defendant exhausted his peremptory challenges before he could challenge either Winston or Liebel peremptorily, and one or both of them sat as one of his jurors, then a biased juror sat, and Busby was denied the impartial jury the *Sixth Amendment* guarantees.") (emphasis added).

Respondent further neglects to address the fact that the right to an impartial jury guaranteed by the Florida Constitution, Art. I, § 16, and the Sixth Amendment to the United States Constitution, are one in the same. As the Florida Supreme Court stated in State v. Neil, 457 So. 2d 481 (Fla. 1984), "Article I, section 16 of the Florida Constitution guarantees the right to an impartial jury. The right to peremptory challenges is not of constitutional dimension. The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury." Id. at 486. This Court's interpretation in Ross v. Oklahoma, 487 U.S. 81 (1988) of the right under the Sixth Amendment is indistinguishable: "[W]e reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension. . . . They are a means to achieve the end of an impartial jury." Id. at 88 (internal citations omitted). And at no time when considering the scope of the right to an impartial jury has the Florida Supreme Court differentiated between the state and federal provisions. Compare Marshall v. State, 854 So. 2d 1235, 1241 n.7 (Fla. 2003); Foster v. State, 778 So. 2d 906, 912 (Fla. 2000); Rolling v. State, 695 So. 2d 278, 284 (Fla. 1997); Powell v. Allstate Ins. Co., 652 So. 2d 354, 358 (Fla. 1995); State v. Alen, 616 So. 2d 452, 453 (Fla. 1993); Brown v. State, 538 So. 2d 833, 834-835 (Fla. 1989); Manning v. State, 378 So. 2d 274, 277 (Fla. 1979).

What respondent does address is the import of the state court's "mention[]" of Ross and United States v. Martinez-Salazar, 528 U.S. 304 (1990). Response, at 4-5. According to Busby, neither opinion is significant. The significance respondent fails to grasp, however, is that the Florida Supreme Court distinguished those decisions upon its conclusion that this Court has not previously decided the constitutional issue as presented in Busby, where a defendant did all that state law required to preserve the impartial jury claim and was denied a request for an additional peremptory challenge to remove an identified venireman. See App. A-21 & n.13 (quoting Martinez-Salazar, 528 U.S. at 317-18

(Souter, J., concurring)). Thus as the Florida Supreme Court opinion makes clear, this case presents an issue left open in Ross and Martinez-Salazar: whether the constitutional right to an impartial jury is violated where a defendant "loses" his state right to a peremptory challenge to remove a biased juror as required by state law to preserve the claim of an erroneous denial of a motion to strike for cause. Moreover, because the majority concluded that "peremptory challenges are fundamental to each party's ability to realize the constitutional guarantee of trial by an impartial jury," App. at A-14 n.8, the decision is interwoven with federal law.

Accordingly, under this Court's independent and adequate state law jurisprudence, see, e.g., Michigan v. Long, 463 U.S. 1032, 1040-1041 (1983), jurisdiction is properly vested in this Court under 28 U.S.C. § 1257(a). See also Ohio v. Reiner, 532 U.S. 17, 20 (2001) ("[T]his Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law.") (internal citation and quotation marks omitted).

II.

The Florida Supreme Court's Holding That A Defendant Has An Unqualified Right To Peremptory Challenges To Effectuate His Constitutional Right To An Impartial Jury Permits The Unconstitutional Discriminatory Use Of Peremptory Challenges.

Respondent believes it is sufficient that "Florida law provides a mechanism for any party to challenge the other's use of peremptory challenges," Response, at 6, notwithstanding that the Busby majority erected a rule of per se reversible error. To obtain automatic reversal, the defendant need only show that the trial court erroneously failed to remove a venireman for cause, having preserved the error by using a peremptory challenge to strike that

individual, used all remaining peremptories, and requested but was denied an additional peremptory challenge to remove an identified juror. Thus even if the State avails itself of the procedure respondent identifies, Petitioner is without recourse upon demonstrating that a defendant's proposed peremptory challenge was racially or otherwise improperly motivated. If the defendant is acquitted, double jeopardy obviously precludes a retrial. In the event that the State does obtain a conviction, the defendant's unconstitutional projected use of a peremptory challenge provides the basis for per se reversible error. The Florida Supreme Court did not create any exception to its rule requiring automatic reversal. Thus the fact that the State could arguably make its record, as respondent contends, is irrelevant. Simply put, the State's remedy is nothing short of illusory.

Accordingly, whether sounding in state or federal law, Busby stands for the proposition that a defendant may, in violation of Batson v. Kentucky, 476 U.S. 79 (1986) and its progeny, and the Fourteenth Amendment, build in reversible error to obtain a new trial in the event of a conviction.

CONCLUSION

Respondent urges this Court to not take up the very issue he presented to the Florida Supreme Court -- i.e., whether the federal constitutional right to an impartial jury is violated when, to preserve the claim under state law, a defendant must use a peremptory challenge to remove a venireman whom the trial court erroneously failed to remove for cause. Because that issue was before the state court and decided, and the Florida constitutional right has always been interpreted *in pari materia* with the Sixth Amendment right to an impartial jury, jurisdiction is properly vested in this Court. Under the majority's opinion, peremptory challenges are now of constitutional dimension and may be exercised on an unconstitutionally discriminatory basis. For the reasons discussed above and in the Petition, the State of Florida prays the Court for its order granting the petition.

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